Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

ROBERT B. WISTER -PETITIONER

vs.

SECRETARY OF VETERANS AFFAIRS

R. JAMES NICHOLSON
Coappellee

SECRETARY OF THE AIR FORCE

JAMES G. ROCHE
Coappellee

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert B. Wister
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QUESTIONS PRESENTED

Dilatory and illegal actions within the VA and subseqent boards and courts to the destruction of veterans rights.

Interference with the Constitutional power of the nation to raise and maintain armed services.

Supervision of lower courts and federal boards and agencies. Failure to apply case precedent and rules of law.

LIST OF PARTIES

All known parties are listed in the cover with the following additions.

Kenneth S. Kessler
Department of Justice-Civil Division
Commercial Litigation Branch
1100 L Street, NW, Room 7026
Washington, DC 20530

Solicitor General of the United States
Room 5614
Department of Justice
950 Penyslvania Avenue, N. W.
Washington, DC 20530-0001

OPINIONS BELOW

The denial of motion for rehearing in the United States Court of Appeals appears as appendix p4 to the petition and has been designated for publication, unknwon if publ`ished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was October 5, 2006.

A timely petition for rehearing, enbanc, was denied by the United States Court of Appeals on the following date December 12, 2006 and a copy of the order denying rehearing appears as Appendix p6.

The jurisdiction of this Court is involked under 28 U. S. C. § 1254 (1).

RELAVENT STATUTORY PROVISIONS INVOLVED

CONSTITUTION: ARTICLE 1. **Section 8. 12. 13. 14. 15. 16,** to raise and maintain armed forces.

CFR 38 4.88b Refusal to acknowledge and apply existence of established categories of disease and chemical/radiation cases and treatment.

38 USCA §§354 (b), 5107,; PB VRR §§3.102, 3.304 (d),

Failure to preserve and maintain service records to the detriment of treatment and diagnosis of noncombat injury and disability. Use thereby to refuse to conform to rule of law in such cases of absent records. Moore v. Derwinski 1 Vet. App. 401, 38 USCA § App-, 91 Destroyed records create presumption of service connection.

Refusal to apply "benefit of the doubt" rule of law in veterans cases. *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991) (when SMRs have been destroyed, BVA has heightened obligation to provide explanation of reasons or bases for its findings and to consider benefit-of-doubt rule). *Curry v Brown 91-504*

38 C.F.R. § 4.87a, DC 6260 (1992):Floyd D. *Bucklinger v Brown* 92-273 disease vs trauma causitive of disability [**constitutional question**]

5 U.S.C. § 702 "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

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STATEMENT OF THE CASE

Veteran served in the Air Force from May 51 to October 54. During that service, while in pilot training, he became hospitalized after a series of increasingly acute medical symptoms. He subsequently was hospitalized several more times with acute severe medical symptoms after resigning pilot training. He was discharged [General] under false pretenses as mentally unfit and NO medical diagnosis of chronic disease.[A22]

Ensuing were continuing medical symptoms of chronic disease denying schooling and employment and costing continuous medical treatment.

Discovery of the underlying cause, concealed from the victim, was made by clinical diagnosis at a VA facility, '96. Such diagnosis was overturned by administrative personnel under false pretenses.[A23]

Application for disability was first "Well grounded case" then denied.[A34] All subsequent actions by boards and courts continued this denial with refusal to admit medical papers to substantiate the clinical set of symptoms or admit the evidence of a military flight surgeon's opinion **"...with some degree of certainty to such an event as the underlying cause..."**.[A70]

The actions are typical long standing, 100 years, and were the model followed in the notorious 'Agent Orange' case where action of congress was necessary to overcome the effects of VA, boards and courts cooperation in concealment and denial.[A72]

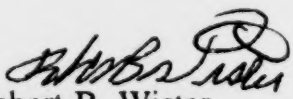
REASONS FOR GRANTING THE WRIT

The case from medical inception is now 55 years. The ongoing chronic disease and the lifelong effects have, as with many others like afflicted, impoverished and debilitated the victim. The medical effects of the particular disease have invaded the civil medical community with complicity in denial and treatment to the detriment of national health. Knowledge of this method of treatment of veterans such as "XYZ War Syndrome", of which this particular disease forms a major part, has become such a well known barrier to recruitment as to bring a national crisis in attempting to return to the medieval conscription process. This will cause an all encompassing national angst and revulsion.

CONCLUSION

It is self evident that conditions in the Veterans Administration and the several courts and boards must be reformed. The effects on public health and national integrity cannot be ignored.

Trial by jury is the only method to demonstrate publicly what has pervaded the government handling of diseased veterans and certain proscribed diseases to the detriment of public health. That will present a public record for use by others so afflicted. A leading case.

Respectfully submitted 

Robert B. Wister
26256 Hickory Ave.
Hayward, CA 94544
May 21, 2007

APPENDIX

1NOTE: Pursuant to Fed. Cir. R. 47.6 this decision is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

06-7030

ROBERT B. WISTER,

Claimant-Appellant.

v.

R. JAMES NICHOLSON. Secretary of Veterans Affairs,

Respondent-Appellant

DECIDED OCTOBER 5, 2006

Before MAYER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and GAJARSA, Circuit Judge.

PER CURIAM

Robert B. Wister appeals the decision of the United States Court of Appeals for Veterans Claims, which affirmed a Board of Veterans Appeals decision denying his claim for service connection for Lyme disease. Wister v. Nicholson, No. 04-324 (Vet. App. Sep. 20, 2005) We vacate and remand.

The Secretary of Veterans Affairs has a duty to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim."38 U.S.C. § 5103A(a)(1). This duty expressly requires the Secretary to "make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain." Id. § 5103A(b)(1); see also Id. § 5103A(c)(1)(requiring the Secretary to obtain a claimant's service medical records).

Wister argues that the Department of Veterans Affairs ("VA") breached its duty to assist him by not obtaining relevant documents from the Air Force, particularly Service Medical Records from November 6, 1952 to March 3, 1953. During this period, Wister was hospitalized and treated at two

Air Force hospitals. The record suggests that some records from this period were obtained. However the government concedes that the records were incomplete. In particular, the government has stated that the record did not include the daily treatment or clinical records for most of that period. In addition, there is no indication that the VA determined that they do not exist or would be futile to obtain.

Nonetheless, the Veterans Court held that the VA fulfilled its duty to assist Wister. In doing so the Veterans Court noted that the VA had requested records from at least ten providers on a list submitted by Wister, advised him of documents not received Wister, No. 04-324, slip op. at 8. It then concluded that there "appears to be no other 'relevant records' specifically identified by Mr. Wister that the VA did not attempt to obtain." Id. The government earlier requested a remand for a determination of whether the duty to assist was satisfied in light of these documents not being obtained and the record being unclear as to whether the VA ever requested them from the Air Force. A judge of this court denied that motion, determining that the argument was best presented in the government's brief on the merits. Wister v. Nicholson, No. 2006-7030 (Fed. Cir. Apr. 5, 2006)(Order). Having now reviewed the issue in its entirety, we agree that remand is proper.

First, despite the court having a nearly two thousand-page record before it and the VA having obtained records from ten providers, the duty to assist is not measured by the bulk of the information obtained. Indeed, compiling a voluminous record does not obviate the need for, nor satisfy the VA's duty to provide, a complete record.

Second, in addressing the merits of his claim, the Veterans Court noted that Wister "does not contend that the [missing] records contain a diagnosis of Lyme disease; rather he believes the records contain other diagnoses or symptoms consistent with Lyme disease." Wister, No. 04-324, slip op.

8. Putting aside the obvious fact that Wister would not know the contents of the documents that the VA failed to obtain, the VA is obligated to obtain them unless "no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103(a)(2) Thus, the Veterans Court applied an incorrect standard by concluding that there are "no other 'relevant records.'" Instead the standard set forth in section 5103A(a)(2) must be applied. In addition, this correct standard should be applied in light of the government's previous motion for a remand, which candidly stated that even if the documents do not contain a [1]Lyme disease diagnosis, they "may be relevant if they contain other diagnoses or symptoms consistent with Lyme disease."

Moreover, when the VA "attempts to obtain records from a Federal department or agency under this subsection or subsection (c), the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile." Id. § 5103A(b)(3). Since the requested records were not obtained and the record does not indicate if any attempts were made to obtain them, we remand for compliance with the duty to assist.

In light of our remand, we do not address the denial of his service connection claim on the merits. Indeed, to the extent that Wister challenges the application of the law to this factual case, we lack jurisdiction. 38 § 7279(d)(2). Wister also has requested the case be transferred to district court for a jury trial. However, a party "in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." Lehman v. Nakshian, 4453 U.S. 156, 168 (1981). Here, the statutory scheme provides the Veterans Court with exclusive jurisdiction to review board decisions, 38 U.S.C. § 7252(a)-(b), thereby precluding the availability of a jury trial.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

06-7030

ROBERT B. WISTER,

Claimant-Appellant.

R. JAMES NICHOLSON, Secretary of Veterans Affairs,

Respondent-Appellee.

Judgement

ON APPEAL from the UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

In CASE NO(S) 04-0324

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED

VACATED AND REMANDED

ENTERED BY ORDER OF THE COURT

DATED OCT 5 2006 S/JAN HORBALY
Jan Horbaly, Clerk

ISSUED AS A MANDATE Dec 12 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT B. WISTER	)	
Claimant-Appellant	)	
	)	No. 06-7030
R. JAMES NICHOLSON	)	
SECRETARY OF VETERANS AFFAIRS	)	
Respondent-Appelle	)	

ORDER

Upon consideration of respondent-appelle's motion requesting that the Court remand this matter to the Veterans Court for further consideration of whether the VA complied with 38 U.S.C. § 5103A, it is hereby

ORDERED, that the respondent-appelle's motion be granted

FOR THE COURT
[BLANK]

Dated: BLANK, 2005
Washington, D.C.
cc:Kenneth S. Kessler
Robert B. Wister

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT B. WISTER	)	
Claimant-Appellant	)	
	)	No. 06-7030
R. JAMES NICHOLSON	)	
SECRETARY OF VETERANS AFFAIRS	)	
Respondent-Appelle	)	

ORDER

A petition for rehearing em banc having been filed by the Appellant, and the matter having first been refered to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been refered to the circuit judges who are in regular service.

UPON CONSIDERATION THEREOFF, it is

ORDERED that the petition for rehearing be, and the same is, DENIED and it is further

ORDERED that the petition for hearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 12, 2006.

FOR THE COURT
s/SIGNATURE
Jan Horbaly
Clerk

Dated 12/05/2006
cc: Robert B. Wister
Kenneth S. Kessler stamp/Jan Horbaly
WISTER V DVA, 2006-7030
(CVA - 04-324)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 04-0324

ROBERT B. WISTER, APPELLANT

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, Judge.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet.App.R 30(a) this action may not be cited as a precedent

DAVIS, *Judge*: The pro se appellant Robert B. Wister, appeals from a February 24, 2004, decision of the Board of Veterans' Appeals (Board or BVA) that denied him service connection for Lyme Disease.[1] This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7525(a) and 7266(a) to review the Board decision. Single-judge disposition is appropriate here because the case is one of reactive simplicity whose outcome is controlled by the Court's precedents and is not "reasonably debatable." *Frankel v. Derwinsky*, 1 Vet.App 23, 25-26 (1990). For the reasons provided therein, the Court will affirm the Board's February 24, 2004, decision.

[1]Lyme disease [term unknown until '74] is transmitted to humans through the bite of infected ticks, presenting with "[t]ypical symptoms including fever, headache, fatigue," and a skin rash, but "[i]f left untreated, infection can spread to joints, heart, and the nervous system." *Learn about Lyme Disease*, Centers for Disease Control and Prevention, Division of Vector-Borne Infectious Diseases, *at* http://www.cdc.gov/ncidod/dvbid/lyme.

1. FACTS

Mr. Wister served on active duty in the U. S. Air Force from June 1951 to October 1954 Record (R) at 18. Service medical records (SMRs) from that time reflected that he was under observation for suspected rheumatic fever (R. at 32), he was treated for mononucleosis (R. at 42-48), he was hospitalized for complaints of stiffness in the back and neck (R. at 101) and he was diagnosed with chronic hepatitis, schizoid personality, deafness in the left ear, and epidermoid cyst (R. at 105), but the SMRs contained no diagnosis of Lyme disease (R. at 101). he received an administrative discharge based on diagnosis of severe schizoid personality. R. at 98.

In July 1996, the appellant filed a claim for service connection for Lyme disease., submitting a letter to his VA physician specializing in infectious diseases, Dr. Karp, regarding his clinical records "to show particularly the clinical signature of the onset of LYME DISEASE." R. at 320 (emphasis in original). He also submitted an April 1996 letter attaching inter alia, medical records check lists regarding symptoms of Lyme disease from articles on Lyme disease, a bibliography of Lyme disease articles, and lists of current symptoms and medications. *See* R. at 425-567. The record also reflects a May 1996 letter revealing that Mr. Wister's "antibody response to the Lyme disease spirochete *B. bergdorferi*" was negative. R. at 687. Additionally, the record reflects an October letter from Mr. Wister to Dr. Karp and the BVA analyzing testing for Lyme disease and including many abstracts of journal articles pertaining to Lyme disease. R. at 695-709. In November 1996, the RO denied service connection for Lyme disease because there was no evidence that Mr. Wister currently had Lyme disease or that it was related to service. R. at 406-08. Mr Wister filed a Notice of Disagreement that same month, attributing the symptoms and "cycles of medical incapacity" to Lyme disease. R. at 410. In

November 1997 De. Karp submitted a statement noting that "Mr. Wister was presently diagnosed, and treated for Lyme disease and exhibits the characteristics of late, long them Lyme disease." R. at 674.

The next month, in December 1997, Mr. Wister underwent a VA medical examination to determine the existence and etiology of Lyme disease. R. 689-93. After reviewing Mr. Wister's claims file (C-file) and conduction a physical examination, Dr. Relman concluded the following:

> [T]here is no good evidence to suggest the diagnosis of Lyme disease either in the 1950s nor at any time subsequently...there is nothing to about this patient's history or physical findings that suggests in a compelling fashion a diagnosis of Lyme disease. Each of his complaints can be explained on the basis of unrelated and common illness. I disagree with Dr. Karp's assessment that the patient exhibits the characteristics of late long-term Lyme disease. In fact, this patient's presentation is atypical for Lyme disease, and together with repeated multiple negative laboratory tests suggest that Lyme disease is quite unlikely in this patient.

R. at 693.

In March 1998, the appellant provided unsworn testimony at a personal hearing, contending that he was the "oldest living diagnoses Lyme case in the world." R. at 933-42. In April 1999, the RO issued a Supplemental Statement of the Case maintaining its previous denial of service connection. R. at 970-81. In February 2000 the Board remanded Mr. Wister's claim for further development. R. at 1003-04. In April 2000 Mr. Wister submitted many documents in support of his claim, including medical articles on Lyme disease, abstracts from journal articles pertaining to

Lyme disease, medical records, and letters to Dr. Karp regarding his daily symptoms and his analysis of Lyme disease. R. at 1332-1408. Thereafter, the RO requested records from at least 10 private and VA physicians (R. 1457-1500), and also requested that Dr. Karp comment on the opinion of Dr. Relman (R. at 1572). In December 2002, VA physician Dr. Thomas Gamsky completed an "infectious, immune, and Nutritional Disabilities Exam." R. at 1758-59, No physical examination was conducted, but Dr. Gamsky noted that "[t]he patient had four large C-files available for review and these were all reviewed in detail." R. at 1758. Dr. Gamsky also spoke to Dr. Karp by telephone about Mr. Wister's prior diagnosis of Lyme disease. R. at 1758-59. Dr. Gamsky documented the discussion as follows:

> Dr Karp feels indeed this patient has symptoms that were suggestive of Lyme disease and that he did provide numerous evaluations and testing for such. However, Dr. Karp was never able to identify Lyme disease in [Mr. Wister] with any degree of certainty and in fact, [in] his report of October 2001, the patient states that he did [] find evidence of Lyme disease....Dr. Karp indicates this patient likely does not have the diagnosis of Lyme disease in his opinion.... The patient had a Lyme titer in 1997. Dr. Karp indicates that this titer was negative.

Id. Dr Gamsky concluded that "this patient does not likely have Lyme disease." *See id.*

In February 2004, the Board issued its decision on appeal. *See* R. at 1-16. In its decision, the board discounted assertions form the veteran that his symptoms represented Lyme disease, noting that Mr. Wister, as a lay person, is not

qualified to offer an opinion that requires medical knowledge. *Id.* The Board further noted that (1) there was no evidence of a diagnosis of Lyme disease in service. (2) Dr. Karp rescinded his 1997 diagnosis of Lyme disease, (3) tests conducted to detect Lyme disease were negative, (4) a VA examiner found that "Lyme disease is quite unlikely in this patient", and (5) another VA examiner concluded that Mr. Wister likely did not have Lyme disease. R. at 10-13. Based on these findings, the Board concluded that (1) "the preponderance of the evidence shows that the veteran does not currently have, nor has he ever had Lyme disease" and (2) "Lyme disease was not incurred in or aggravated by service." R. at 10, 13.

II. APPLICABLE LAW AND ANALYSIS

A. Parties Arguments

On appeal to the Court, Mr. Wister argues that his current symptoms and past diagnoses contained in his medical records definitely prove that he has Lyme disease. Appellant's Brief (Br) at 6-17: Appellant's reply Br. at 4. in support of his conclusion, he first notes Dr. Karp's diagnosis of Lyme disease (Appellant's Br. at 9), and discounted Dr. Karp's recision of his diagnosis, stating that Dr. Karp was "forced to retract his clinical diagnosis" during a period of partial remission of his symptoms (Appellant's Reply Br. at 2). Additionally, Mr. Wister cites a medical journal that identifies symptoms of Lyme disease that were reflective of his own symptoms (Appellant's Br. at 9), an unnamed treatise identified Lyme disease as accounting "for 91% of vector borne infections in the United States" (Appellant's Br. at 15), and an additional book on Lyme disease which explained the lack of positive test results (Appellant's Br. at 12). He suggests that medical that medical records were missing from his file, which contained further diagnoses and symptoms

indicative of Lyme disease. Appellant's Br. at 13-14; Appellant's Reply Br. at 2, 3. On these grounds Mr. Wister requests that this Court not remand his claim, rather, he essentially requests reversal of the Board's decision and an award of total damages in excess of $8.9 million. Appellant's Br. at 17-20.

The Secretary argues that the Board reviewed and considered all pertinent evidence of record and provided an adequate statement of reasons or bases to support that service connection for Lyme disease is not warranted. Secretary's Br. at 7-11. The Secretary that generally Mr. Wister's contentions consist primarily of arguments regarding symptomology that he believed were ignored by VA. Secretary's Br. at 12. As to Mr. Wister's allegation of missing records, the Secretary maintains that the record is replete with VA's attempts to assist Mr. Wister in obtaining any records that he believed were missing, including sending a form to Mr. Wister's Congressman to assist him in obtaining any missing records himself. Secretary's Br. at 12.

B. Service Connection

Service connection for purposes of VA disability compensation will be awarded to a veteran when the record before the Secretary contains (1) a medical diagnosis of current disability, (2) medical or lay evidence of incurrence or aggravation of disease or injury in service, and (3) medical evidence of a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110: *Caluza v. Brown,* 7 Vet. App. 498, 505 (1995), *aff'd per curiam,* 78 F.3d 604 (Fed. Cir.1996)(table); 38 C.F.R. § 3.303 (2004). Service connection is a factual determination by the Board that the Court reviews for clear error. *See Rose v. West,* 11 Vet. App. 169, 171 (1998). "A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990)(quoting *United States v. U. S. Gypsum Co.,* 333 U.S. 364, 395 (1945). "[This Court is not permitted to substitute its judgement for that of the BVA on issues of material fact; if there is a 'plausible' basis in the record for the factual determination of the BVA,...[the Court] cannot overturn them." *Id.* at 53 "The appellant bears the burden before this Court of establishing that the fact-finding below was clearly erroneous." *Zinc v Brown,* 10 Vet. App. 258, 259 (1997). However, the Board cannot reject evidence favorable to the claimant without providing adequate reasons for its decision. *See Meyer v. Brown,* 9 Vet. App. 425, 433 (1996).

The Board must base its decisions on "all evidence and material of record." 38 U.S.C. § 7104(a), and must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). *See Douglas v. Derwinski,* 2 Vet. App. 435, 438-39 (1992)(en banc}; *Gilbert, supra.* In addition, the Board must "account for the evidence which it finds to be persuasive or unpersuasive," and provide reasons or bases for rejecting evidence submitted by or on behalf of the claimant. *Gilbert,* 1 Vet. App. at 57. However, the Board need only provide written statements of its findings regarding "material" evidence. *See Douglas* and *Gilbert,* both *supra.* ("Material evidence" has been defined in new-and-material-evidence context under 38 C.F.R. § 3.156(a) as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claims. 38 C.F.R. § 3.156(a)(2004). The Court finds this definition for out purposes here as well.) Reversal is the appropriate remedy only when "there is absolutely no plausible basis" for the Board's decision and where that decision "is clearly erroneous in light of the unconterverted evidence in the appellant's favor." *Hicks v.*

Brown, 8 Vet. App. 417 (1995). In the absence of a finding of nonprejudicial error, where the Board has failed to provide an adequate statement of its reasons or bases for its determinations, vactur and remand is warranted. *See Duenas v. Principi*, 18 Vet. App. 512, 517 (2005).

1. Reasons and Bases

Here, the Board noted that Mr. Wister's opinions regarding his symptoms representing Lyme disease were inappropriate because, as a lay person, Mr. Wister was "not qualified to offer an opinion that requires medical knowledge, such as a diagnosis or an opinion as to the cause of disability." R. at 10 (citing *Espiritu v. Dersinski*, 2 Vet. App. 492, 494-95 (1992)). However, although not specifically raised by Mr. Wister, the Board's recitation of facts and analysis lacked reference to Mr. Wister's medical treatises submitted before the board, even though medical treatises may constitute "competent medical evidence." *See* 38 C.F.R. § 3.159(a)(1) (2004)(noting that "competent medical evidence" includes "statements conveying sound medical principles found in medical treatises" and "statements contained in authoritative writings such as medical and scientific articles and research reports or analyses"; R. at 1-16.

With regard to medical treatise evidence, this Court has held that generally, medical treatises are too inexact, standing alone, to satisfy the nexus requirement for service connection. *See Sacks v. West*, 11 Vet. App. 314, 317 (1998). In *Sacks*, the appellant stated that he experienced sores on his mouth during his active service, an allegation that was confirmed by statements of his parents. *Id.* at 315. After being later being diagnosed with "pemphigis vulgaris" the appellant sought to introduce a medical journal article that stated that pemphigis vulgaris usually presents with "painful mouth erosions," which "are the only abnormality for months before the skin erosions and or facial blisters develop." *Id.* He relied on this evidence to demonstrate that his pemphigis

vulgaris arose during service. *Id.* In determining that the medical treatise evidence was insufficient to establish the nexus the Court reasoned that a statement as to symptomology "cannot be used by a lay person to evaluate meaningfully the facts in a specific case because it in no way addresses-let alone eliminates-the possibility of the existence of other conditions that also often present with the same symptomology." *Id.* at 317. The Court did find, however, that medical articles and treatises evidence "can provide important support when combined with an opinion of a medical professional." *Id.*

Here, Mr. Wister's medical articles identifying symptomology likewise, standing alone, cannot establish nexus, nor that he has a current disability, particularly in the absence of similar opinion of a medical professional. *See id.* Because the articles are insufficient to prove any unestablished fact necessary to support his claim. (i.e., a current disability or incurrence or aggravation in service), the Board did not error by not addressing this immaterial evidence. *See* 38 C.F.R. § 3.156(a).

Nonetheless, the Board is not permitted to "rely[] on its own unsubstantiated medical opinion" when rendering and analysis as to service connection. That is not the case here. As explained below, even if the Board erred in failing to analyze the probative value of certain evidence, any error was nonprejudicial to Mr. Wister because the preponderance of evidence fails to demonstrate that he ever had Lyme disease. *See Duenas, supra; see also Soyni v. Derwinski,* 1 Vet. App. 540, 546 (1991) (declining to remand where, because evidence was "overwhelming" against the claim, "strict adherence" to reasons-or-bases requirement "would result in this Court's imposing unnecessary additional burdens on the BVA and [VA] with no benefit flowing to the veteran").

2. Plausible Basis

In the instant case, as the Board found (R. at 13), the

preponderance of evidence is against a finding that Mr. Wister has a current disability of Lyme disease or that it was incurred or aggravated in service, as required by 38 U.S.C. § 1110. Service medical records contain no reference to Lyme disease. R. at 10, *see* R. at 23-287. The first mention of the possibility of Lyme disease occurred many years after separation from service. R. at 10-11. Even then, in May 1996, a test administered to Mr. Wister revealed a negative antibody response to "the Lyme disease spirochete." R. at 687.

Additionally three physicians concluded that Mr. Wister likely did not have Lyme disease. Although in November 1997, Mr. Wister's infectious disease physician, Dr. Karp, submitted a statement reflecting that Mr. Wister was diagnosed and treated for Lyme disease (R. at 674), he later recanted that diagnosis, stating that Mr. Wister likely did not have a diagnosis of Lyme disease (R. at 1758-59). In December 1997, after reviewing Mr. Wister's C-file, Dr. Relman concluded that Lyme disease was "quite unlikely" R. at 693. Finally, in December 2002, Dr. Gamsky reviewed "in detail" Mr. Wister's large claim file (which at that time, would have included Mr. Wister's evidence regarding symptomology and medical treatise evidence) and concluded that Mr. Wister "does not likely have Lyme disease." R. at 1758-69.

Although Mr. Wister believes that some records are missing, he does not contend the records contain a diagnosis of Lyme disease; rather he believes the records contain other diagnoses or symptoms consistent with Lyme disease. Because Mr. Wister is a lay person unable to provide a medical opinion that requires medical knowledge, *see Espiritu*, 2 Vet. App. at 494-95, even when combined with medical treatise evidence, his contentions as to symptomology, unsupported by any medical opinion, and specifically refuted by three physicians, are insufficient to render clearly erroneous the Board's conclusion that Mr.

Wister never had Lyme disease or that it was incurred in service. *See Sacks, supra.* Because there is a plausible basis in the record for the Board's conclusion, this Court will affirm the Board's February 2004 decision.

C. Duty to Assist

The Court will construe Mr. Wister's allegations of missing medical records as a claim that VA violated its duty to assist him as required by 38 U.S.C. § 5203A. Under section 5103A, VA is required to "make reasonable effort (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain." 38 U.S.C. § 5203A(b)(1). Mr. Wister submitted a list of providers from which he asked the VA to obtain medical records. R. at 1452. VA requested records from at least 10 providers (R. at 1457-1500), advised Mr. Wister as to release forms still needed (R. at 1495, 1914-19, and advised him of documents that had not been received and information still needed (*id.*). Other than the providers, there appears to be no other "relevant records" specifically identified by Mr. Wister that VA did not attempt to obtain. As such the Court finds that the VA fulfilled its duty to assist.

III. CONCLUSION

Accordingly, upon consideration of the record and the briefs filed in this appeal, and the reasons stated therein, the February 24, 2004, decision of the Board is AFFIRMED.

DATED SEPT 20 2005

Copies to:
Robert B. Wister
26256 Hickory Avenue
Hayward, CA 94544-3112
General Counsel
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 04-0324

Robert B. Wister, Appellant

v.

R. James Nicholson

Secretary of Veterans Affairs, Appellee

JUDGEMENT

The Court has issued a decision in this case. The time allowed for motions under rule 35 of the Court's Rules of Practice and Procedure has expired

Under Rule 36 judgement is entered this date

DATED: OCT 12 2005

FOR THE COURT
NORMAN Y. HERRING
Clerk of the Court
By:s/**Karen Meyer**
Deputy Clerk

Copies to:
Robert B. Wister
26256 Hickory Avenue
Hayward, CA 94544
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Washington, DC 20420

United States Court of Appeals for Veterans Claims
DOCKET

Docket No: 04-0324

Robert B. Wister, Appellant,

V.

Secretary of Veterans Affairs, Appellee.

Pro se: Appellant	Appearances of Appellee
Robert B. Wister 26256 Hickory Avenue Hayward, CA 94544 U.S.	Kerry J. Loring, Esq. 202-639-4805

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BVA Information		Date	Explanation	Received	Disbursed
BVA File No.:	18 558 714	3/5/2004 11/28/2005	FEE CVA FCC	$ 50 $ 255	$ 50
BVA Decision Mail Date:	2/24/2004				

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United States Court of Appeals for Veterans Claims

Robert B. Wister — Docket No: 04-0324

	Date	Filings and Proceedings	Action	Date
	3/2/2004	Notice of Appeal (STYGLA) (STYGLA)		
	3/3/2004	Notice of Docketing for ff or declaration by 3/17/04; Bva Dec by 4/2/04; Dr by 5/3/04 (M-3/3/2004) (TALLEJ)		
	3/4/2004	Copy of BVA Decision (STYGLA) (M-3/4/2004) (JSAYERS)		
	3/5/2004	RECEIVED: Notice of Appeal (duplicate) (-3/5/2004) (TALLEJ)		
	3/5/2004	FILED:US Court of Appeals for Veterans Claims' Filing Fee - $50.00 (Not Assigned) (Not Assigned)		
	4/1/2004	Appellant's petition to combine (M-3/22/2004) (COLVINB)	PTD/CLS	4/6/2004
	4/1/2004	Appellant's petition for extraordinary relief (M-3/22/2004) (COLVINB)	PTD/CLS	4/6/2004
	4/15/2004	Correspondence from appellant (no date) (M-4/15/2004) (BACONL)		
	4/29/2004	Ord that the appellant's motion for extraordinary relief is denied. (IVERSD) (BACONL)		
	5/3/2004	Appearance of David L. Quinn, atty for the appellee (M-5/3/2004) (BACONL)		
1	5/3/2004	Designation of Record (STYGLA) (M-5/3/2004) (BACONL)		
	5/3/2004	Notice to Counter-Designate Record within 35 days (BACONL)		
	5/10/2004	Counter Designation of Record (M-5/10/2004) (BACONL)	CLS	5/14/2004
1	5/21/2004	Appellee's mo to strike appellant's transmittion of the record on appeal. (M-5/21/2004) (BACONL)	CLS	6/22/2004
	6/1/2004	RECEIVED: Correspondence from appellant dated 5-31-2004 (M-6/22/2004) (DESHAP)	CLS	6/22/2004
	6/3/2004	RECEIVED: Correspondence from appellant (2 binders) (DESHAP)	CLS	6/22/2004
	6/4/2004	Appellee's mo to ext time to file record the record on appeal by July 9, 2004. (M-6/4/2004) (BACONL)		
	6/4/2004	Appellee's motion for stay of proceedings (M-6/4/2004) (DESHAP)		
2	6/7/2004	RECEIVED: Correspondence from appellant (military packet form) dated 6-1-2004 (DESHAP)	CLS	6/22/2004
	6/14/2004	RECEIVED: Correspondence from appellant dated 6-8-2004 (DESHAP)	CLS	6/22/2004
	6/17/2004	Clerk's ord granting the appellee's mo for ext to file the record on appeal by July 9, 2004. (LBACON) (BACONL)		

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2 11 Bundles Record on Appeal 1,800 + pages

United States Court of Appeals for Veterans Claims

Robert B. Wister — Docket No. 04-0324

Date	Filings and Proceedings	Action	Date
6/22/2004	Clerk's ord granting appellee's mo of 6-4-2004 to stay proceedings (DESHAP)		
6/28/2004	Mo of appellant for removal of the case to the District Court. (M-6/28/2004) (TALLEJ)	TD/CLS	6/29/2004
6/28/2004	RECEIVED: Declaration of Financial Hardship (-6/28/2004) (TALLEJ)		
7/1/2004	Ord that the appellee's mo to strike is granted; fur ord that the appellant's mo for removal of the case to district court is denied; fur ord that the pleading lodged by the appellant on 5/10/04 is not accepted for filing; the Clerk will return the pleading and accompanying documents to the appellant with this order; fur ord that the appellant file a CDR or statement by 8/2/04 (IVERSD) (MCCOYA)		
8/30/2004	Appearance of Kerry J. Loring, atty for appellee replacing the representative of record (M-8/30/2004) (MONTGI)		
9/1/2004	Record on Appeal (M-9/1/2004) (WILLIR)		
9/2/2004	Notice to File Brief within 60 days (WILLIR)		
9/10/2004	RECEIVED: Correspondence from appellant dated 09/07/04. (H-9/13/2004) (JSAYERS)	APS	9/29/2004
9/22/2004	RECEIVED: Correspondence from appellant dated 9/20/04. (H-9/27/2004) (JSAYERS)	APS	9/29/2004
9/27/2004	Correspondence from appellant dated 9/22/04 noting that Appellant has not filed a brief to this date. (H-9/29/2004) (JSAYERS)	BRF-T	11/2/2004
9/30/2004	Notice of returned papers to appellant. Correspondence dated 9/7/04 & 9/20/04 returned as not contemplated by the Rules of Court. (M-9/30/2004) (JSAYERS)		
10/1/2004	RECEIVED: Correspondence from appellant (-10/1/2004) (TALLEJ)	VM	10/1/2004
10/7/2004 *	Ord that the appellant clarify the intent of his pleading within 20 days after the date of this ord; should the appellant fail to provide clarification, the Crt will accept the pleading as an attempt to file an interlocutory appeal to the U.S. Court of Appeals for the Federal Circuit (LANEJ) (GASKIA)		
10/13/2004	Appellant's response to the Court's order dated 10/7/04. (H-10/15/2004) (JSAYERS)	CLS	10/15/2004
10/25/2004	Ordered that the Court's Notice to File Brief issued on 9/2/04, remains in effect. (JFL) (JSAYERS)	BRF-T	11/2/2004
11/2/2004	Appellant's Brief (H-11/4/2004) (JSAYERS)	BRF-E	1/10/2004
1/7/2005	Mo of appellee to ext time until 1/25/05 to file brief (M-1/7/2005) (TALLEJ)		

United States Court of Appeals for Veterans Claims

Robert B. Wister — Docket No: 04-0324

Date	Filings and Proceedings	Action	Date
1/12/2005	Clerk's ord granting mo of 1/7/05 until 1/25/05 (TALLEJ) (TALLEJ)		
1/14/2005	RECEIVED: Correspondence from appellant dated 1/7/05 (H-1/14/2005) (JSAYERS)		
1/25/2005	Appellee's Brief (M-1/25/2005) (JSAYERS)	BRF-RPY-T	2/15/2005
2/7/2005	Appellant's Reply Brief (M-2/7/2005) (TALLEJ)	TD/CLS	2/9/2005
3/14/2005	Assigned to Judge Davis (TOBESS)		
9/20/2005	Memo Decn that the BVA decn is affirmed (RDAVIS) (MEYERK)	JUDGMENT	10/11/2005
10/12/2005	Judgment (MEYERK)	MANDATE	12/12/2005
10/24/2005	Appellant's Notice of Appeal to the USCA for the Federal Circuit (M-10/24/2005) (MEYERK)		
10/27/2005	Letter to appellant in ref. CAFC filing fee (MEYERK)		
11/28/2005	FILED:Federal Circuit Court of Appeals Filing Fee - $255.00 (Not Assigned) (Not Assigned)		
11/30/2005	Appellant's Notice of Appeal transmitted to USCA for the Federal Circuit (MEYERK)	TRACK	12/1/2006

END OF DOCKET — 11/30/2005 8:35:24 AM

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Karen Meyers
Deputy Clerk

APPELLANT'S BRIEF
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
No. 04-0324
ROBERT B. WISTER
Appellant
v.

SECRETARY OF VETERANS AFFAIRS
Anthony J. Principi
Coappellee

SECRETARY OF THE AIR FORCE
James G. Roche
Coappellee

Robert B. Wister
26256 Hickory Ave.
Hayward, CA 94544-3112
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Pro Se

PREFACE TO - APPELLANT'S BRIEF 04-0324

This brief is submitted within the time of the rules of the Court of Appeals for Veterans Claims [Rule 28, November 1, 2004]. It is submitted in sole reference to the Appellant's Record on Appeal submitted within the rules of the Court of Appeals for Veterans Claims, thereby the only valid Record on Appeal, mailed return receipt July 1, 2004 with official post office postmark. This was characterized falsely as "6/7/RECEIVED: Correspondence from appellant (military packet form) dated 6-1-2004 (DESHAP)."

Successively the aforementioned court has acted solely on the behalf of the Appellee's counsel to such extent that all actions by such counsel violating rules of the court: out of date, falsely entered mailing [metered], falsified statements of appellant agreement, felony content and redaction of medical records [felony misprision], have been sanctioned by the aforementioned court thereby demonstrating the cause whereby Appellant applied for Removal to District Court for both ongoing prejudice and lack of jurisdiction. USC 5 § 301 § 706 § 2604.301 *et. seq.*;§ 2608.102 *et. seq.* § 2635.101 § 8912 (a)(b)(1)(13)(14)

The utter lack of jurisdiction is demonstrated by the several claims involving interest due for the egregious period of compensation denial of 50 years after application and the fact of the aforementioned court NEVER having sanctioned a single case, of compensation on record, for contraction of chronic disease of a veteran while in service.

That demand for removal being denied 7/1/04, Appellant applied for Writ of Centiori and the first service of that writ upon the Court of Appeals for Veterans Claims was characterized on 9/10/04 as **Appellant's Brief.** The writ was later returned, after firm letter, 9/30/04 as "[x] Other Not contemplated by Rules of the Court." This is the further demonstration of asinine actions of a court run amok. Appellant has been AGGRIEVED.

From the application to the United States Supreme Court: It is ironical that an appeal must be filed from a court

of appeals to a court of appeals, such are the destructive events under 28 U.S.C. § 1651(a). *ERSPAMER v Derwinski* 89-14. Appellant shall stand on that demonstration of the abject lack of jurisdiction.

IN BRIEF 04-0324

INCEPTION OF CASE (STATEMENT OF ISSUES)

Upon initial application for disability November 1954 [R50, p227][R51, L form 452], the appellant was specifically not advised of rights, alternatives or modes of redress [CFR 38 § 5101,§ 5120 ('86);§ 3.7 § 3.9 (d)('57)]. The diseased condition of appellate with weight 154# [R51, C33 form 88s and all records were available to VARO Phoenix, then destroyed. 14 Dec, 1954], joint, lung and neurological symptoms, being hospitalized for 9 months of that year [R13] [R14], ill disposed appellate, with confused mental state, to respond to sophisticated and contemptible denial process [R18]. The mental stress exemplified in the subsequent Air Force award for 10% [R55 Nov 8, 2000 VASRD code 9327, 00-0165][R26, ch 27][R24, p210][R25 p59-61] bears out this condition. CFR 38 § 3.94 § 3.167('57).

38 CFR § 3.303(d)(1998),§ 3.89 § 3.245 (a)(b)('57). "Disability which is proximately due to or the result of a service-connected **disease** or injury shall be service connected." 38 CFR § 3.310(a) (1998). H.R. Rep. No. 963, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S. Code Cong. & Admin. News 5782, 5795 "new and material", that

determination (but only that determination) would be subject to review on appeal to this Court. If we find this determination "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 38 U.S.C. § 4061(a)(3)(A) (1988);CFR § 5120(b)(1)('86) § 3.201 (f)('57)... This action is therefore a reopening of the November, 1954 disability claim, with "new and material evidence." *Falzone v Brown* 8 Vet. App. 398, 95 Reopen claim on new and material evidence. CFR 38 §3.9 (d).

Appellant was held at Letterman until outward symptoms were reduced to an ear drainage [R14] [R16], such periodic remission phases so well known as to demonstrate secret diagnosis [R23][R24, p150] by Army Drs well versed in the disease. psychiatric physician, Dr Sweeny, verbally informed appellant he 1would be, "held till he accepted the psycho discharge or died" [R14][R50, p205-10]. Parting admonition to appellant was, "never donate blood." Appellant then applied for disability [R50, p227][R51, L form 452, p227] November, 1954 is therefore cited as commencement of this case for purposes of designation of applicable law; 38 § 3.400(2)(i)(ii) 104th congress act placing first date of VA disability claim at the first date of application;§ 5120 Effective date (b)(1) application within one year from date of discharge(86); § 3.148 (1)('57). *(Felton v. Brown*, 7 Vet.App. 276, 283-86 (1994). (*Johnson v Principi* **03-1039 (E) change in law-most favorable will apply)**[R51, C,K]. Thus commenced Murder By Calendar (MBC).

DESCRIPTION OF CASE BASIS (STATEMENT OF CASE)

The disease, Woodsman's-Acrodermatitis Chronica Atrophicans-Erythema Chroncium Migrans-Lyme Disease [*Borrelia burgdorferi*], hereafter WEL, is prehistoric, before man walked, as seen in [R51, sections A, p9;G, p58]{A_S,G_S} [R27. p 106]. [R26, p28] Presence of the disease is prevalent in the locality where onset occurred [R51, B]{B_S}{LYMIL}. Knowledge of the disease and it's presence on all continents has been widespread since 1903 and was diagnosed as early as 1883 [R51, A, G]{A_S}[R26, ch 1, p4, Fig 4-2]. A 1909 meeting at the Karolinska Institute in Stockholm, Sweden was devoted to this disease [R20]. North American endemic disease was mentioned in two papers with some tradition that the US Army Medical Corps had a representative present. The military/VA have relied upon the conversion of the NAME of this disease in 1974, to reflect a local diagnosis in Lyme, CT, prior to etiologic identification, to deny any possible infection before 1974. [R22 p163] CFR 38 § 5109(a)('86).

Identification of the bacteria [*Borrelia burgdorferi*] in 1982 [R51, E][R26, ch 1][R22, p185] and the prior assigned name led to the mendacity continuously recited by, VA employed, assigned diagnostic Drs Relman and Locksley to state, "you could not have had LYME DISEASE at that time." This was also mediated by the redaction by the military/VA of critical hospital records of febrile condition,

from November 6, 1952 through March 3, 1953 [R6]: Jamuary '53 through September '53 [R7][R8]. Dr Relman is a "molecular microbiologist" NOT as an infectious disease clinical physician (postdoc). See Science 11 June 04 (1591). His use is similar to hiring a novelist to write laws. *Moore v. Derwinski* 1 Vet. App. 401, 38 USCA §§354 (b); PB VRR §§3.102, 3.304 (d), 38 USCA § App-, 91; *Murphy v. Derwinski*, 1 Vet.App. at 82; *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991), CFR 38 §5109 (a) §1101('86) § 3.87 (i)(j)('57).

Hospitalization at Kinston AB, Maxwell AFB, Mather AFB and Letterman Army Hospital resulted in spinal taps due to the meningitis/spondylitis (8019) demonstrated [R6] [R8] [R13] [R14][R51, K_S (ID94314437)]. Each demonstrated "protein" ([R13]18 Jan '54-42.5). No tests were made to identify this invasive presence. Bacteria had been seen and was to be ignored since the cause was well known by the Drs beginning at Maxwell AFB and was to be ignored by administrative fiat. CFR 38 § 7316('86) § 3.67 (1)(ii)(2)§ 3.91 § 3.142('57).

A superb demonstration of the Hipocritic Oath? (*Austin v Brown*, 6 Vet. App. 547(1994)) True in NAME (Lyme) only. It is probable that Dr Karp's renunciation of diagnosis was induced on that name basis, and missing SMRs [R49, 4/17/00][R52,2.8-21/00]. It is assured that many hundreds of thousands of veterans, from WWs I & II to date, have been denied treatment and disability or died on that, on

similar false basis, while infected with WEL, AKA, XYZ war syndrome.

It has been demonstrated, by filing of a recent case involving the primary care Dr, that the VA Oakland (undoubtedly not isolated) has participated in falsely diagnosing bacterial disease as HIV/AIDS to socially stigmatize veterans who would otherwise be elgible under sections CFR 38§ 4.88b for compensation for service derived disease. This is repetition of the false use of the Wassermann test to shut the serviceman's mouth. This is not murder by calendar, as so often is used, but direct intrinsic murder by falsification of diagnoses and tests or destruction of medical records. This process is well documented, within the body of this case, as prevalent.

DETAIL OF ONSET OF DISEASE (ARGUMENT)

Onset of the disease in June 1952, Stallings AB Kinston, NC, [R50, sec 1] was a classic symptom set for Erythema Chroncium Migrans (ECM) [R50, 3, 4] [R51, C(33)] as the disease was known to the medical community at that time. Immediately following a class 1 flight medical, July 15, 1952, [R4] symptoms began CFR § 3.05 (c)(d) § 3.89. This removed the appellant from flying duty as an aviation cadet several times before late October. *Flu symptoms Hosp (July 18), common cold (29 July), UND (18 Aug), vertolate bandage rt thigh (18 Sep), Hot soaks to thigh (19 Sept), Bartosis Media DNIF 300K p-cillin 1M*

neosenphrine (3 Oct), back on flying status (6 Oct), painful stiff wrist, neck & back [rheumatic fever 7932] (29 Oct) Hosp, T98 admit to hospital, suspect influenza (6 Nov),[R50, 1][R6][R51, C] (4121, 5060, 5801, 7932)]{C_S} reduction to bed ridden status culminating in meningitis, missing SMRs [see recreation R6]CFR 38 § 3.91('57). *Transfer to Maxwell AFB Hosp (14 Nov)* [R50, 1][R51, C] missing SMRs [see recreation R8] italics are Capt. Hensel's MC, FS, (D'72) hand written statements. This caused air evacuation to Maxwell AFB Hospital, Alabama [recreation R7]. INFLUENZA IN THE SUMMER? 5 MONTHS LONG? CFR 38 § 3.91('57)

The series of diagnoses such as Baritosis Media, Hepatitis, Rheumatic Fever, Mononucleosis, Yellow Jaundice, Arthritis...all common to the symptom set of WEL is in what record remain available [(2)*Caluza*]. Many SMRs missing, strangely strategic in nature covering the **initial 116 days hospitalization** [R6][R7][R8]. Appellant was returned to duty February 1953 from Maxwell AFB Hospital **(with psychiatric clearance)** [R51, C29] to graduate primary flight training in class 53-G. Entry had been in class 53-E. The vermin infested parade ground, many rodent holes, is well illustrated in class book, Base Leg 53-E [R19]{AFBSCO60}. This is the most probable source of tick carriers and attachment due to high grass illustrated in photos. Long term infirmary records, if provided as demanded, will reveal that the appellant was not the sole victim of this base maintenance problem. CFR 38 § 3.78 § 3.142('57).

DETAIL OF FOLLOWING MILITARY MEDICAL TREATMENT

Recurrence of symptoms, syncope while flying [R50, 2], at Greenville AFB, MS, [R9] led to the resignation of the aviation cadet appellant after hospitalization, August 1953 [R10][R11][R12]. Appellant was returned to an earlier base assignment at Mather AFB, Sacramento, CA. December 1953 sick call and then January, 1954 admission to base hospital [R13] [R50, 3] ensued. Symptom set, a repeat of June 1952 symptom sequence serious enough, on January 18, '54, to require a PRIVATE ROOM [R13] [R51, J] {J_S} (missing SMRs). Treatment with ACTH, cortisone was commenced there, to continue at Letterman, this mistreatment was the eventual basis for chronic seronegative disease [R50, 3][R51, H]{H_S}. 38 U.S.C. § 1151 (1991); *see Brown v. Gardner*, 513 U.S. 115 (1994), CFR 38 § 7316('86) § 3.167('57).

Transfer was made to Letterman Army Hospital April 1954 [R14]. There is a continuing record of "rheumatoid spondylitis"[R50, 3, p205][R51, C] lung and joint conditions, removal of cyst from neck [R50, p203,9][R51, D]{D_S}((2) *Caluza*)(missing SMRs [R14]), removal of wisdom teeth, aggregated into "aberrant personality", "smokes a pipe and has individualistic outlook" as a catch all, and recommended for general discharge [R25, ch 5, p59](MBC). Appellant was advised by Captain Sweeny (NP) that he would be held until, "he agreed to psycho discharge or died." Appellant was also advised at the same time to, **"never donate blood"!** [R50, 3,

p183-185]. Sweeny then crossed out administrative separation and wrote in **"DUTY" on form DD481-1** to prevent medical separation DD481-1 Aug 19, '54 [R15]. Statements by Major Michaels, "This airman is considered satisfactory with the exception of those characteristics contained in the Medical Board Proceedings and are not within our capabilities to correct." Mather AFB[R50, p219]. Mental disturbance characteristic of WEL [R16][R26, ch 27]. Airman A/1C Culp (supervisor)," He often needed a shave but I believe this was due to a rash or tender skin." Dermatology of WEL identified. [R50, 3; p221][R26, ch 9][R24, p81] *Talbert v. Brown* 7 Vet. App. 352, CFR 38 § 5108 § 7104 (b),('95) "Clear and unmistakable error" first and subsequent decisions on "cured" disease or remission. CFR 38 § 3.78 § 3.142('57); § 3.167('57).

The Air Force board determined paradoxically that appellant was "fit for duty" and yet required a discharge, under general conditions [R50, p225]. Here is concrete evidence that the board was well informed that further episodes of disease symptoms were known to be soon evident. "Smokes a pipe and has independent opinions" became the asinine method of evading the chronic diseased condition [R50, p183-5]

MANIFESTATIONS ON DISCHARGE

Discharge in October 1954 was immediately followed

by prostate infection treated by Dr Lentz of Phoenix [R51, L]. This symptom had been previously experienced in February at Maxwell AFB Hospital [R16] (missing SMRs). Dr Lentz speculated that the infection had led to sterility. This was followed by lung ('55) and joint ('56-'59) problems [R1 Dr Porter FAA flight medical, cleared '48, '51, refused '56]. Most notably in January 1956 and June 1956 spinal disc and hip swelling, resulting in paraplegia [R18] [R33] [R37] [R41] [R62]. These symptoms continued to the point of divorce from appellant's first wife, from poverty and physical disability [R33].

EDUCATION AND EMPLOYMENT DISRUPTION

These and the "mental fog" disorientation typical of the disease [R41][R25, p28], continued through attempts to return to college education, begun at Cal-Tech 1950 [R28]. A full semester could not be accomplished, at U of A, without symptomatic interruption. College was abandoned in 1959 attaining only junior year status. Subsequent employment history includes only one period of employment exceeding 3 years, 9 year exception [R29][R39][51, R]{V42297A2}. This came by accepting a reduced status and income. It became necessary to write a clever resume to hide periods of illness to achieve some employment. Periods of symptomatic occurrence terminated most of these positions [R29]CFR 38 § 3.168. The usual employment title was Design Engineer which consisted of a draftsman with a title and no salary due

to lack of college degree. *Hicks v. Principi* 4 Vet. App. 2, 94 Substantial gainful employment must address patchwork employment history. *Snow v Derwinski* 90-432; "the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded... Section 5109A(b). CFR § 3.168('57).

These same factors caused the termination of two more marriages, no issue. The induced mental state from these occurrences can only be termed suicidal [R24, p59-61, p75]. This culminated in the Federal Law requiring employees to be provided medical insurance coverage in the normal sites of appellant employment. Rates imposed due to appellant medical history precluded further employment [R51, R]. *Hicks v. Principi* 4 Vet. App. 2, 94 Id. *employability Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991).

DISCOVERY OF CAUSATIVE DISEASE

First relevant information, that led appellant to investigate WEL as a possible cause of recurrent symptoms, came from, *Scientific American*, July 1987, p 78-83 [R23]. An article on "Lyme Disease" demonstrated the congruent set of symptoms and an occupance map including the region where the onset took place [R26, fig 4-2, p28][R50, 1][R51, B]{B_S}{LYMILT}. It was only after 9 years of study of the available information and assembly of appellant's history that appellant applied to VA for care in the belief that the disease was service contracted. VA medical interview 1/12/95

[R29A]. Subsequent visits, 1/12/96 Lung symptoms, 1/25/96 history, 1/29/96 leg nerve, 1/30/96 PT evaluation, 2/6/96 Rink-history (21-4142), 5/22/96 cyst [R29A] [R35] [R62] [R63] [R64]{96DAY}{P_S}[R33][R24, p195]. Dr Richard A. Karp, MD, MPH, Infectious Disease, rendered a diagnosis of WEL, as "Lyme Disease", beginning in 1952, after reading a copy of book 1 [R50, p166][R51, p197]. This book has only 10% of the record of initial hospitalization due to VA/military destruction of records [R51, C33]. This led to the filing of form 9, filed with BVA 11/96: 3/16/98 BVA docket issued #xx xxx xxx [R34] [R37] [R40] [R45]. 38 U.S.C. § 1151 (1991); *Brown v. Gardner*, 513 U.S. 115 (1994).

DISCUSSION OF PREVIOUS CVA APPEAL

In the matter of previous filings the following is the detailed record of the occurrence that brought about that filing with CVAC [R35][R36][R40][R43][R51, N] {96DAY}{97DAY}{CVAPE1}. This included daily records of condition and a pericarditis episode typical of the disease. [R51, M]

** "Attached is a bill that occurred as a result of failure of diagnosis and resulting critical acute distress to the patient. VA Oakland failed diagnosis on 2/13/97. Kaiser also failed in diagnosis 2/20/97 **[this bill 09352010]**. VA Palo Alto VA Hospital failed diagnosis 2/22/97. VA Oakland referred the case to Ft. Miley 2/24/97 and the patient was transported by ambulance that evening. Dr. Karen [Howard] diagnosed

pericarditis late that evening at Ft. Miley ER. 460 cc were catheterized from the heart on 2/25/97. Patient was discharged from Ft. Miley Hospital 3/7/97 [Dr. Chung].

On the morning of 2/20/97 both a FAX and a phone contact were made with VAOMC. NO reply or advice and direction were given in response. Obvious life threatening medical situation drove the entry to Kaiser ER that day consistent with previous and subsequent medical treatment. Refusal of coverage by the VA beginning **4/14** is not consistent with the case. The veteran is indigent since present income is $896 per month SSA. Current VA care is based on that. Future care will be based on claim xx xxx xxx, now before the Board of Veterans Appeal. Lyme disease is the basis of the claim and also the only probable cause of this episode of pericarditis." **

Appellant was **actually DEAD** twice during this occurrence and heartbeat restored by electric shock! [R35 Shinn (UCSF)] {CARD1}[R51, I][R26, p53, ch 11] This occurrence resembles a Jarish-Herxheimer reaction, well known in the literature [R29A]{96DAY}[R26, p216]. The material removed from the pericardial sack was tested for virus but NOT BACTERIA [R35][R38], CFR 38 § 7316('86). VA administrative persons directed failure to provide indicated medical care and diagnosis. The disease (CFR 38§ 4.88b Lyme Disease 6319) has become fully political [R25, p74][R56][R57][51, A].

This was the first recognized demonstration that VA

care was directed to shorten the life of appellant (MBC+). Subsequently on admission to Ft, Miley at the direction of Dr Karp 27 Aug, 2001, after earlier ER discharge there [R64] {01DAILY}, the cause of internal bleeding (≈pint per day) was found to be a colon cancer, by endoscopy 8/30/01. Appellant was discharged while still bleeding, on Friday 31 August, 2001, and told to come back next Wednesday for evaluation. Appellant entered civilian hospitalization 9/1/01 and was operated on 6 Sept, 2001 and again 17 Sept, 2001 leaving the hospital 18 Oct, 2001. Blood transfusion was necessary. *Whipp v Principi* 3 Vet. App. 453, 94. This life terminal symptom sequence, with VA medical incompetence, was evaluated by the CAVC as **"frivolous" [R36]**. A third death is "frivolous".

DISCUSSION OF VA TREATMENT AND DIAGNOSIS

Early within the period of VA medical care, 1996, appellant was assigned Dr. Richard A. Karp, MD, MPH (Internal Medicine, Infectious Diseases) as Primary Care Physician. After 47 VA medical appointments, 11 of which were direct with Dr Karp a clinical diagnosis of Lyme Disease (WEL) was rendered [R33] [R51, F]{APT} {96DAY}. During that period lung, nerve, arthritic, spinal, multiple cyst, neurology, dermatology, optic symptoms were seen and treated [R29] [R32] [R51, P]{ERYTH}. 10/22/96 Erythromycin administered for pneumonia **(available 1950)** (asthmatic WEL induced) produced dramatic reduction of a

major subset of symptoms {K_S}[R24, p150][R51, K, N]. 424 citations were found at that time in MedLine medical paper data base, commending Erythromycin as effective when the ...cillin family had been used inappropriately in early treatment (mutation). 6 years of prescription of Erythromycin followed [R33][R51, N]{ERYTH}{CRITPAP}{CRITPA1}. Several major symptoms were suppressed. Later a course of Cefitraxione IV was administered with further notable reduction of some symptoms [R40]{CETFR}. Response to these drugs **identified the disease** beyond any clinical or diagnostic test limits. Papers to this effect were furnished Dr Karp as listed {99TREA} [R57].

Dr Karp had a copy of excerpted, partial, Air Force medical records from June 1954 to discharge [R50]. His library contained *Lyme Disease*, by P. K. Coyle, MD [ISBN 1-55664-365-9]. This book was loaned to appellant [R26]. Chapter 25, SERONEGATIVE LYME DISEASE, explained the lack of positive results from the ELISA tests [R31, 4/24/96 Locksley diversion of PCR to ELISA]{LOCKSLEY}. Early maltreatment with Penicillin, ACTH, Cortisone [R50, 1] [R51, H]{H_S}, plus long term mutation gave the reasons for negative test results and conversion to chronic disease [R50, 3] [R51, J]{J_S}. Later, papers found within the MedLine data base cited a seronegative strain peculiar to the Mid Atlantic states [R51, F]{F_S}[R40, #4 9/22/97]. A written signed diagnosis was furnished, by Dr Karp, to the appellant November 1996 based on the preponderance of clinical data

observed [R50, p266] [R51, p279] (*Wallin v West* 97-1023, *Sacks v West* 97-1336; *see also Libertine v. Brown,* 9 Vet.App. 521, 523 (1996) (medical treatise evidence must demonstrate connection between service incurrence and present injury or condition). Appellant has maintained a daily log of blood pressure/pulse and symptomatic condition subsequent to the February 1997 cardiac occurrence [R51, M, N, O]{DALY\}. This is available to the court, up to current date, if any question should arise as to continuing chronic manifestation. ((1)(3) *Caluza)* The VA has continuously used, and applied, the full knowledge of the mental, physical and motor effects of the disease, they claim does not exist, to deny the claim for infection and induce conflicting statements in repeated "Hearings."

Thereby the 2/24/04 BVA decision of denial of claims is CUE! [R61] The two major salient reversals of, "Duty to Assist" (Duty to Euthanasia) and diagnosis, demonstrate ongoing felony criminal behavior, misprision. Refusal of independent medical examination by appellant selection (BOR Article VI)[R31] [R32] [R42] [R46]. *ERSPAMER v Derwinski* 89-14 "expeditiously as possible" ten years or more for INDEPENDENT MEDICAL REVIEW.; *Godfrey v. Brown*, 7 Vet.App. 398, 406 (1995) (where service-connection claim is based on continuity of symptomatology under 38 CFR 38 § 3.303(b) (1994) § 3.63 (b) § 3.170('57), *Bailey v. Derwinski*, 1 Vet.App. 441, 446-48 (1991). *Marlow v Brown* 5 Vet. App. 146, DIS F.3d 443, 93.

The VA has adamantly refused to acknowledge the Air Force determination (00-0165-6/27/00) [R52] [R59] which states in part:" RECOMMENDATION: The BCMR Medical Consultant is of the opinion that, in order to correct a long standing injustice, the records should be changed to reflect the applicant was **medically discharged** with 10% disability under VSRD code 9327, disability pay to be made **retroactive to his date of separation.**..S/Fredrick W. Hornick, Col, USAF, MC, FS. (1)(2)(3) *Caluza*. The words, "likelihood, plausibility and some **degree of certainty"**, are used in the discussion of the decision, with reference to WEL. Need there be any further nexus? {CODESLYM} Service connection may be established by demonstrating chronicity under 38 C.F.R. § 3.303(b) *Cook v. Brown* 4 Vet. App. 231, 93 Unreasonableness of time lapse between manifestation of chronic disease and definite diagnosis is strength of evidence establishing evidence of disease manifestations and chronic disease. Is it held by the VA/Military that "smoking a pipe and having independent opinions" absolutely precludes the possibility that the individual was diseased? It is amazing how the VA relies on the well known effects of the disease, that they claim does not exist, to preclude the evidence for diagnosis of the disease.

DISCUSSION OF VA BEHAVIOR

Where are the VA letters, that were required, to inform the denied appallent of the 1957 congressional

modifications to CFR 38 which changed the entire character and credibility of his application for disability? Duty to assist? CFR 38 § 3.7 (57') § 3.159 ('98).

The "Record on Appeal" demonstrates the following VA mandated mendacity and intentional incitation of extreme reaction, with unsigned letters, directed by the internal practices of the VA for the destruction of the appellant and others so situated. Multiple critical SMRs were and are strangely missing that were required to exist for the service position of the appellant such as Flight Physicals required for pilot status [R1] [R2] [R9] [R10] [R33] [R51, BVA] (2) USC 5§ 522 FOIA demands ignored (suddenly they appeared in the too late filing of appellee's, so called, RoA) 38 CFR § 14.560('98).

Critical periods of hospitalization where meningitis occurred are stripped from the SMRs (since recreated for this case) [R6] [R7] [R8], **CFR 38 § 20.611 38 § 0.735-3 Extension of the right to apply punitive compensation for continuing dilatory action by the VA, refusing to act in relevant manner. USC 5 § 301 May not withhold information or limit availability of records** (7543): Tort USC 5 § 552 exhaust remedies USCA (154) West Freedom of information act [R29A] [R34] [R33] [R37] [R38] [R40] [R41] [R42] [R43] [R44] [R45] [R46] [R51, A, B, D, E, F, G, H, I, J, M, N] [R52]. Action by the local office in cooperation with the DAV representative attempted to convince the appellant that there was no case (MBC)[R35].

The DAV representative had been presented with Book 1, Wister's case for Lyme Diagnosis 4/14/96[R50]. [R33 11/96 DAV discharge letter] This volume was a copy of that in the hands of Dr Karp. A copy was later transmitted with other material to the BVA and the US Air Force Board for Military Record Correction, April 16, 2000 BVA transmission of books 1 (266p) [R50] & 2 (279p) [R51] of military and civil records + Coping with Lyme Disease ISBN 0-8050-4775-1[R25] + Lyme Disease ISBN 0-8018-5245-5[R26]. The local office, Oakland, then proceeded to demand a set of 21-4142 medical release papers for the second time by that office (an earlier set had been furnished Oakland Outpatient Clinic, 1/25/96)[R30](MBC). Each two years another set of 21-4142 papers was demanded so another futile 2 years could be expended writing dead Drs (MBC). Review of appellant's Record on Appeal will demonstrate the abusive use of inciting letters that would allow the local office to delay from 30-90 days, any reply (MBC) [R23] [R30] [R31] [R32] [R33] [R37]. 28 U.S.C. § 1651(a). *ERSPAMER v Derwinski* 89-14 (decade of delay...acting upon the claims submitted by petitioner and her husband has been unreasonable) (success MBC).

In particular, F.M. Hoffschneider with unsigned letters alleging such as, "congenital spinal disease" [R32] [R43] [R51, BVA], fed the bureaucratic mendacity with the intent to Murder By Calendar [R47]. Civil aviation medical examinations '48-'56 refute all prior conditions falsely stated

along with induction physical [R1] [R2]. Selective reading of letters and form 9 continued throughout. Consistent with general rules of agency in that principals are liable for the misdeeds (felony) committed by their agents when the agents act with apparent authority, appellant cites *GLEASON v. SEABOARD AIR LINE R. CO.*, 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed 415 (1929). F. M. H. further stated at another time that appellant, "was not an expert in Lyme Disease." This case shall prove that false. *Espiritu v. Derwinski*, 2 Vet.App. 492, 494-95 (1992). This ongoing well defined process ran it's full course, then the case was transferred to Cleveland, Ohio, so the process could start ab into as if the date had been (3/21/03) for filing a form 9 [R48] [R59] [R60] . (*Pelegrini v Principi, 01-944 et. seq.*). Apparently done on the excuse of VCAA passage to ignore, and destroy, material of previous "well grounded case,...expedited case." [R49, 2/9/00 WGC] *Epps, 126 F.3d at 1469* duty to assist in "well grounded case". This is not "duty to assist" (duty to euthanasia), it is compulsion to murder! Another complete set of futile 21-4142 medical release papers was demanded so another 2 years could be consumed in calendar murder writing dead Drs [R60](MBC). Appellant should hope that the VA produces the reply letter for the court [R60]. IT IS EMPHATIC. *Hilkert v West* 12 Vet.App. 145, 149-50 (1999) "stealth consideration" ...not hide their reasons and reasoning under the table. This constitutes adamant adversarial action contrary to 38 U. S. C. § 5107(a); *Den/Holland v. Brown* 6 Vet. App. 443, 96; *Epps*,

126 F.3d at 1469.

Letters to Dr Karp and the VA Inspector General on the AF determination of medical discharge with 10% disability were summarily ignored [R59] [R60]

The occurrence of only two cases within the CAVC data base (both denied) which cite the term "Lyme Disease" falls within the definition cited by Sam Clemmons, "there are liars, damned liars and statisticians." [R52]{LYMILT} Since the CDC annually cites approximately 6,300 cases ('00) of the disease per year under draconian rules which eliminate 80% of true cases, cited many times in the medical treatises, this means that some 30,000+ cases occur per year within the US. Since hunters, fishermen, woodsmen, children and hikers are the most susceptible and their habitat is analogous to military training, the results fulfill the case. Several hundred treatises within the MedLine data base begin with such phrase as, "This pathogen now accounts for 91% of vector-borne infections in the United States, and from a public health viewpoint is one of our major emerging infectious disorders." [R51, J]{J_S, p8}. Note the congruent symptom list seen at CFR 38 § 3.317(5)(b). This thus becomes a 'Leading Case.'

Prosecution of Drs Orens and Joseph J. Burrascano, Jr (infected) before the New York Medical Board for "excessive diagnosis of Lyme Disease", with removal of license to practice, further notified the medical community that diagnosis, reporting and treatment would not be tolerated by a SECRET accuser. Asher Fensterheim, Esq., 555 White

Plains Rd., Tarrytown, NY 10591, Atty for defense, Orens [R56]. Also see New York State OPMC Reform Bill A4274b. The term conspiracy, fits well.

This sequence bore out the insight which caused claim 6 in the initial form 9 filing [R30] [R34]. **6. 38 § 20.611 38 § 0.735-3 Extension of the right to apply punitive compensation for continuing dilatory action by the VA, refusing to act in relevant manner.** It is appellant's belief that a case can be made for the actions of the VA and it's representatives to be held for treason against the body of citizen soldiers and consequently the nation, in time of war. Alternately a few saints could be created in the VA for the miracle of never allowing a, CFR 38§ 4.88b Lyme Disease 6319, case to occur. This case begs the nice word, EGREGIOUS. See, e.g., Noyd v. Bond, 395 U.S. 683, 695 n.7, 89 S.Ct. 1876, 1883, 23 L.Ed.2d 631 (1969) (United States Court of Military Appeals); United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966)

The sum of VA behavior is a well informed psychological process. Withholding or destroying records [R6] [R7] [R8] [R17] [R18]; continuous violation, with impunity, of all sections of CFR 38...; infinite delay with repetitious recreations of medical, trauma and other stress centric records [R5] [R6] [R8] [R13] [R14] [R15] [R29]; fraudulent statements in obvious total opposition to the case facts [R62] [R63] [R64]; demeaning reversals of case supporting evidence through coercion or intimidation [R31] [R33] [R37] [R38]

[R39] [R46] [R49] [R52]; violation of court rules in order to force prolongation of all these effects [6/8/04 Extension...], are full evidence of the felonious behavior, with intent, ingrained within the VA. This is only described as a VA extension of the actions of North Korea and it's allies, during the Korean Police Action, known then as **BRAIN WASHING.** A review of cases demonstrates that this is THE prevalent mode of operation by the VA.

It has become apparent that the CAVC is dominated and directed by the VA legal corps. When a Record on Appeal fully compiled, mailed within rule time (6/1/04) and using postal certification is characterized as "6/7/RECEIVED: Correspondence from appellant (military packet form) dated 6-1-2004 (DESHAP)" the compliance of the CVAC with it's rules and norms of judicial performance was questioned in filing United States Supreme Court Appeal for Writ of Centiorari, September 20, 2004 *et seq.*

SUMMARY (CONCLUSION)

When it waddles like a duck, quacks like a duck, flies like a duck and lays an egg, it is not the dog the VA claims it to be. CFR 38 § 5107(b) § 3.317(5)(b).

Foregoing recitation of history, medical records, USAF determination and treatises presentation far exceeds preponderance of evidence and assures, beyond shadow of doubt, that CFR 38§ 4.88b Lyme Disease 6319..100% describes this case, from inception to date. *Lendenmann v.*

Principi 3 Vet. App. 345, 92 Where no code exists, VA must evaluate under codes for analogous disorders. CFR 38§ 3.142 § 3.78

VA actions within this case both at the administrative and medical levels have been a complete inversion of the intent of congress in establishing the VA and the Court of Appeals for Veterans Claims. CFR 38 § 3.317(5)(b)('98) must be reenacted on a historically broad basis.

SLAVERY

That the cost of onerous slavery is high is exemplified in the recruiting, head-hunting, costs variously stated as $35-50,000 per victim of the DoD. Actions similar to this case and spread across this nation have informed educated individuals to the point of induction, of degraded to military service, only those of low moral or mental capacity or education, with little other choice. Military service has become a holding pen for the lowest levels of society through onerous actions against those who would be patriots. Once more there will have to be conscription in a "FREE" society. Ongoing scandalous activities at the various military academies demonstrates that the problem pervades all ranks. During appellant's period of service, a conscription mediated period, the current recruitment costs would have paid a full four years enlistment plus bonus. This is not solely inflation. Institutional insanity is costly. The historic caution is the battle of Lepanto, October 1571, where the unfettered, free

oarsmen, of the west added decisive power against the chained galley slaves of the Turk. The lesson has not been learned. The veteran is murdered to reduce the cost of war.

RELIEF SOUGHT

Appellant asks the court to award the following quoted from form 9 filed with VA 11/96, **with the addition of time financial evaluation.** [not within the purview of the court or BVA/VA] This is the requirement that the case be held only in Federal District Courts, Rule 38, as demanded 6/24/04.

Appellant claim:

1. CFR 38 § 3.17 § 3.340(3) § 3.488(b) § 6319 § 3.400(2)(i)(ii), Compensation for 100% disability from first date of application November 1955 to present and continuing. $1,300,000 est as of 8/01/96, with interest, equal to T-30 year bonds at the then current rate, from date due of each monthly payment. [AVOIDED COST BY OVERT CRIMINAL ACT] *see also P.A. Bergner & Co. v. Bank One*, 140 F.3d 1111, 1123 (7th Cir. 1998) ("[P]rejudgment interest should not be thought of as a windfall in any event; it is simply an ingredient of full compensation that corrects judgments for the time value of money."); *In re Milwaukee Cheese Wis., Inc.*, 112 F.3d 845, 849 (7th Cir. 1997) ("Compensation deferred is compensation reduced by the time value of money."); *cf. IBM v. United States*, 201 F.3d 1367, 1374-75 (Fed.Cir. 2000). ("Congress has waived sovereign immunity in both *the tax code* and *the*

customs laws to permit interest to be paid on certain refunds to allow for the time value of money when the Government has had the use for a period of time of money to which it is not lawfully entitled.") [*Sandstrom v Principi*, 99-1440] TRAC, 750 F.2d at 80.

Claims for benefits due to military service clearly implicate human health and welfare concerns as distinguished from economic regulation. In consideration of the "nature and extent of the interests prejudiced by delay," we must reject the suggestion made by counsel for respondent at argument that any and all prejudice resulting from the decade's delay would be offset by retroactive payment should the BVA ultimately determine that benefits were warranted. Payment of benefits ten years after they were due could never serve as full compensation.

2. CFR 38 § 3.340(3)(i)(ii) Compensation for loss of education due to ongoing episodes of WEL symptoms. $500,000 as of 8/01/96

3. CFR 38 § 3.800(a) § 3.400(b)(i) Compensation for continuing medical expenses as a civilian without VA medical assistance 1955-96. $175,000 as of 8/01/96, subsequent $5600 and growing.

4. CFR 38 §3.340(2) Compensation for loss of income during and ensuing from medical episodes with exclusion from medical insurance coverage and resulting exclusion from employment and retirement plans. $1,000,000

5. CFR 38 § 0.735-3,§ 3.340(3)(b) Compensation for

ongoing and continuing refusal of the Veterans Administration to promptly evaluate and adjudicate the disability application with evaluation of ongoing medical episodes indicating chronic disease, 1955-present. $1,000,000 [or jury to determine]

6. CFR 38 § 20.611 § 0.735-11(b)('98) Extension of the right to apply punitive compensation for continuing dilatory action by the VA, refusing to act in relevant manner. $5,000,000 actual + [or punitive by jury]

Without this settlement condition, the accrued interest on the avoided disability payments will cover lesser payment with profit left to the abusive and criminal tactics demonstrated in this and similar cases. Abuse will be rewarded, rapine and murder of the veteran, citizen, will continue. This requires trial by jury under Federal rule 38. Failure to act under All Writs Act, 28 U.S.C. § 1651(a), places the Court of Veterans Appeals, en banc, as accessory before the fact of MURDER. Hence the afore will REPEAT & REPEAT & REPEAT... .

APPLICABLE LAW

Appellant cites laws within the period from commencement of the case, 1954 to date of appeal, the run of the case, to the date of, Court of Appeals for Veterans Claims, appeal. Further this case falls under: Appellant also cites case law decisions within that same period in support of contentions. In particular: 5 USAC § 301 May not withhold

information or limit availability of records (7543); 515 tort; USC 5 § 552 FOIA exhaust remedies USCA (154) West, Freedom of information act. *Moore v. Derwinski* 1 Vet. App. 401, 38 USCA §§354 (b), 5107,; PB VRR §§3.102, 3.304 (d), 38 USCA § App-, 91 Destroyed records create presumption of service connection.: *Mattson v. Derwinski* 2 Vet. App. 643, 38USCA§5107 (a), 92 Absence of medical records places burden on BVA (141 Heightened). In all events the case is required to be published! See copyright.

This court (Court of Appeals for Veterans Claims) does not have, by several decisions seen in the data base, ANY jurisdiction or competence on any of the six elements of this claim. Therefore under writs, mandamus (FC rule 38) is required, if not so done, then centiorari is necessary and applied. Constitutional questions of civil rights and constitutional maintenance of a military are involved.

PRO SE JUSTIFICATION

Appellant has determined, from conversations with various counsel applying for representative status in this case, that the VA has assigned several to insert themselves, falsely, to divert and destroy this appeal. Others cannot honestly pursue the case without being disbarred from CVAC practice. The case is therefore maintained on Pro Se basis and will continue so. Disease never having been awarded a positive decision the EAJ laws have no effect. No lawyer can be expected to operate in a blind alley.

NB: Any remand to the VA will result in further appeal to remove to Federal Circuit Court for trial by jury under Rule 38 of the Federal Courts for obvious reasons of time and age. **Appellant does not have another 30 days, much less 50 years** more to squander. *ERSPAMER* Id. 28 U.S.C. § 1651(a). Note the following successes in support of the MBC statement: Murphy 90-107; Johnson 92-1227; Austin 93-130; Marciniak 95-0465; Hilkert 96-208; Cooper 97-609; Moore 97-787; Davis 97-1057; Sacks 97-1336; Brown 97-1674; Teten 98-1244; Hasty 98-1511; Woodson 98-1595; Dobbin 99-1461; Taylor 03-1278(E); Calloway 03-1980;...446 total DIC on data base. [DIC=Died In Court]. The ultimate success is seen in *Morton v. Gober*, No. 99-7191. The VA is demonstrated to be more deadly than any foreign enemy, for PROFIT. *See RICO statutes.*

Codicil:

Those items shown {thus} are submitted in electronic form as 3½" disk, WP6 format as seen in vetapp.org, for the convenience of the court. They, are as noted, also in paper form as submitted to the VA/BVA/AF AND as listed in Record on Appeal 7/1/04.

Codicil #2:

Since the Board of Veterans Appeals is not constituted as a Federal Court by Congress, the Court of Appeals for Veterans constitutes a Federal District Court under all federal statutes

and congressional directives. Thus the "All writs statutes" may be interpreted in a far different manner than is now functional. Jurisdiction is "NOT limited to review but may be definitive and proscriptive." If something under the law is NOT what is seems to be, then it may not be operated, under the law, as what it is purported to be.

Respectfully submitted

Robert B. Wister
26256 Hickory Ave
Hayward, CA 94544

BOARD OF VETERANS' APPEALS
VA Department of Veterans Affairs
SYMBOL Washington, DC 20420

IN THE APPEAL OF ROBERT B. WISTER
C18 558 714

DOCKET NO. 97-10 109A

DATE FEB 24 2004

On appeal from the
Department of Veterans Affairs Regional Office in
Oakland, California

THE ISSUE

Entitlement to service connection for Lyme disease.

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Michael Martin, Counsel

IN THE APPEAL OF ROBERT B. WISTER
C18 558 714

INTRODUCTION

The veteran had active service from June 1951 to October 1954.

This matter came before the Board of Veterans' Appeals (Board) on appeal from a decision of November 1996 by Department of Veterans Affairs (VA) regional office (RO) in Oakland, California. The United States Court of Appeals for Veterans Claims (Court) denied petitions by the veteran for extraordinary relief in October and November 1997 after he accused the VA and his former representative organization of colluding to suppress evidence.

In February 2000, the Board remanded the claims for additional development. The requested development has since been completed, and the case is now ready for appellate review.

FINDINGS OF FACT

1. All evidence necessary for review of the issue on appeal has been obtained, and the VA has satisfied the duty to notify the veteran of law and regulations applicable to the claim, the evidence necessary to substantiate the claim, and what evidence was to be provided by the veteran and what evidence the VA would attempt to obtain on his behalf.
2. The preponderance of the evidence shows that the veteran does not currently have Lyme disease.

CONCLUSION OF LAW

Lyme disease not incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

1. Duty to Assist

During the pendency of this appeal, on November 9, 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat.2096 (2000). The Act is applicable to all claims filed on or after the of enactment, November 9, 2000, or filed before the date of enactment and not yet final as of that date. The new law eliminates the concept of a well-grounded claim, and redefines the obligations of the VA with respect to the duty to notify the appellant and his representative, if represented, of any information and evidence needed to substantiate the

claim. 38 U.S.C.A. §§ 5102 and 5103. Second, the VA has a duty to assist the appellant in obtaining evidence necessary to substantiate the claim. 38 U.S.C.A. § 5103A.

The VA has promulgated revised regulations to implement these changes to the law. See 66 Fed. Reg. 45,620 (Aug 29, 2001)(codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a)). The intended effect of the new regulations is to establish clear guidelines consistent with the intent of Congress regarding the timing and scope of assistance VA will provide to a claimant who files a substantially complete application for VA benefits, or who attempts to reopen a previously denied claim.

The Court's decision in *Pelegrini v. Principi*, No.01-944 (U.S. Vet. App. Jan 13, 2004) held, in part, that VCAA notice consistent with 38 U.S.C. § 5103(a) and 38 § C.F.R. § 3.159(b) must: (1) inform the claimant about the information and evidence not of record that is necessary to substantiate the claim, (2) inform the claimant about the information and evidence that the VA will seek to provide, (3) inform the claimant about the information and evidence the claimant is expected to provide; and (4) request or tell the claimant to *provide any evidence* in the claimant's possession that pertains to the claim, or something to the effect that the claimant should "give us everything you've got pertaining to your claim(s)." This new "fourth element" of the notice requirement comes from the language of 38 C.F.R. §3.159(b)(1).

In this case, although the VCAA notice letter that was provided to the appellant does not contain the "fourth element," the Board finds that the appellant was otherwise fully notified of the need to give the VA any evidence pertaining to his claim. The Board finds that the VA's duties

under the law and revised implementing regulations have been fulfilled. The veteran was provided adequate notice as to the evidence needed to substantiate his claims. The Board concludes the discussions in the rating decision, the statement of the case (SOC), the supplemental statements of the case (SSOC) and letters sent to the veteran informed him of the information and evidence needed to substantiate the claim and complied with the VA's notification requirements. The documents, such as a letter dated May 2003 and the statement of the case issued in August 2003, provided the veteran with a specific explanation of the type of evidence necessary to substantiate his claim, as well as and explanation of what evidence was to be provided by him and what evidence the VA would attempt to obtain on his behalf. *See generally Quartuccio v. Principi,* 16 Vet. App. 183 (2002). The RO also supplied the veteran with applicable regulations in the SOC and SSOCs. The basic elements for establishing service connection have remained unchanged despite the change in the law with respect to duty to assist and notification requirements. The SSOC of August 2003 addressed the provisions of the VCAA. The VA has no outstanding duty to inform the appellant that any additional information or evidence is needed. All the VCAA requires is that the duty to notify is satisfied, and that claimants are given the opportunity to submit information and evidence in support of their claims. Once this has been accomplished, all due process concerns have been satisfied. *See Bernard v. Brown,* 4 Vet. App. 384(1993).; *Sutton v. Brown,* 9 Vet. App. 553 (1996); *see also* 38 C.F.R. § 20.1102 (harmless error). In this case, because each of the four content requirements of VCAA notice has been fully satisfied, any error in not providing a single notice to the appellant covering all content requirements is harmless error.

The Court decision in *Pelegrini v. Principi,* No. 01-944 (U.S.

Vet. App. Jan 13, 2004) also held, in part, that the VCAA notice, as required by 38 U.S.C. § 5103(a), must be provided to a claimant before the initial unfavorable agency of original jurisdiction (AOJ) decision on a claim for VA benefits. In this case, the initial AOJ was made prior to November 9, 2000, the date the VCAA was enacted. VA believes that the *Pelegrini* decision is incorrect as it applies to cases where the initial AOJ decision was made prior to enactment of the VCAA and is pursuing further judicial review on this matter. However, assuming solely for the sake of argument and without conceding the correctness of *Pelegrini,* the Board finds that any defect with respect to the timing of the VCAA notice requirement in this case was harmless error for the reasons below.

In the present case, a substantially complete application for service connection for Lyme disease was received in July 1996. Thereafter, in a rating decision dated in November 1996 that issue was denied. Only after that action was promulgated did the AOJ in May 2003, provide notice to the claimant regarding what information and evidence is needed to substantiate the claim, as well as what information and evidence must be submitted by the claimant, what information and evidence will be obtained by the VA, and the need for the claimant to submit any evidence in his possession that pertains to the claim.

Because the VCAA notice in this case was not provided to the appellant prior to the initial AOJ adjudication denying the claim, the timing of the notice does not comply with the express requirements of the law as found by the Court in *Pelegrini.* While the Court did not address whether, and if so, the Secretary can properly cure a defect of the timing of the notice, it did leave open the possibility that a notice error of this kind may be prejudicial to a claimant.

The Court in *Pelegrini* found, on the one hand, that the failure to provide the notice until after the claimant has already received an initial unfavorable AOJ determination, i.e. a denial of the claim, would largely nullify the propose of that notice and, as such prejudice the claimant by forcing him or her to overcome an adverse decision, as well as substantially impair the orderly development claims development and adjudication. *Pelegrini*, No. 01-944, slip op. at 13. On the other hand, the Court acknowledged that the Secretary could show that the lack of a pre-AOJ decision notice was not prejudicial to the appellant, *Id.*("The Secretary has failed to demonstrate that, in this case, lack of such a pro-AOJ-decision notice was not prejudicial to the appellant.")

In light of these two findings on prejudice, the Board finds that the Court in *Pelegrini* has left open the possibility of a notice error being found to be nonprejudicial to a claimant. To find otherwise would require the Board to remand every case for the purpose of having the AOJ provide a pre-initial adjudication notice. The only way the AOJ could provide such a notice, would be to vacate all prior adjudications, as well as to nullify the notice of disagreement and substantive appeal that were filed by the appellant to perfect the appeal to the Board. This would be an absurd result, and as such it is not a reasonable construction of 5103(a). There is no basis for concluding that harmful error occurs simply because a claimant receives VCAA notice after an initial adverse adjudication.

Moreover, while strictly following the express holding in *Pelegrini* would require the entire rating process to be reinitiated when the notice was not provided prior to the first agency adjudication, this could not have been the intention of the Court, otherwise it would not have taken "due account of the rule of prejudicial error" in reviewing the Board's

decision. *See* 38 U.S.C. § 7261(b)(2). *see also Conway v. Principi,* No. 03-772 (Fed. Cir. Jan 7, 2004)(There is no explicit exemption for the notice requirement contained in 38 U.S.C. § 5103(a) from the general statutory command set forth in section 7261(b)(2) that the Veterans Claims Court shall "take due account of the rule of prejudicial error.")

In reviewing AOJ determinations on appeal, the Board is required to review the evidence of record on a de novo basis without providing any deference to the AOJ's decision. As provided by 38 U.S.C.§ 7104(a), all questions in a matter which under 38 U.S.C. § 511(a) are subject to decision by the Secretary shall be subject to one review on appeal to the Secretary, and such final decisions are made by the Board. Because the Board makes the final decision on behalf of the Secretary with respect to claims for veterans benefits, it is entirely appropriate for the Board to consider whether the failure to provide a pre-AOJ initial adjudication constitutes harmless error, especially since an AOJ determination that is "affirmed"by the Board is subsumed by the appellate decision and becomes the single and sole decision of the Secretary in the matter under consideration. *See* 38 C.F.R. § 20.1104. There is simply no "adverse determination," as discussed by the Court in *Pelegrini*, No. 01-994, slip op. at 13. Similarly, a claimant is not compelled under 38 U.S.C. § 5108 to proffer new and material evidence simply because an AOJ decision is appealed to the Board. Rather, it is only after a decision of either the AOJ or the Board becomes final that a claimant has to surmount the reopening hurdle.

All the VCAA requires is that the duty to notify is satisfied, and that claimants be given the opportunity to submit information and evidence in support of their claims. Once this has been accomplished, all due process concerns have been satisfied. *See Bernard v. Brown,* 4 Vet. App. 384 (1993).

Sutton v. Brown, 9 Vet. App. 553 (1996), *see also* 38 C.F.R. § 20.1102 (harmless error)

Here, the Board finds that any defect with respect to the timing of the VCAA notice requirement was harmless error. While the notice provided to the appellant in May 2003 was not given prior to the first AOJ adjudication of the claim, the notice was provided by the AOJ prior to the transfer and certification of the appellant's to the Board, and the content of the notice fully complied with the requirements of 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b). After the notice was provided, the case was readjudicated and a Supplemental Statement of the Case was provided to the appellant. The claimant has been provided with every opportunity to submit evidence in support of his or her claim, and the respond to VA notices. Therefore, notwithstanding *Pelegrini*, to decide the appeal would not be prejudicial error to the claimant.
The Board also finds that all relevant facts have been properly developed to the extent possible. The claims file contains the veteran's service medical records. His available post service medical records have also been obtained. The veteran did not respond to a recent letter requesting his assistance in obtaining any additional outstanding records. He has been afforded VA examinations, and appropriate opinions have been obtained. The veteran testified at a regional office hearing. He was scheduled for a hearing before a Member of the Board in September 1999 but failed toappear. Although the veteran has reported that he did not appear because his poor eyesight prevented him from reading the notification of the hearing date, the Board notes that a letter dated in August 1999 the veteran specifically indicated that he would attend the hearing on September 17, 1999. Thus, he clearly had knowledge of the hearing date and he did not present any valid reason for missing the hearing. For the foregoing reasons, the Board concludes that all reasonable efforts were

made by the VA to obtain evidence necessary to substantiate the veteran's claim. Therefore, no further assistance to the veteran with the development of the evidence is required.

In the circumstance of this case, a remand to have the RO take additional action under the new Act and implementing regulations would serve no useful purpose. *See Soyini v. Derwinski,* 1 Vet. App. 540, 546(1991)(strict adherence to requirements of the law does not dictate an unquestioning blind adherence in the face of overwhelming evidence in support of the result in a particular case; such adherence would result in unnecessarily imposing additional burden on the VA with no benefit flowing to the veteran); *Sabonis v. Brown,* 6 Vet. App. 426, 430(1994)(remands which would only result in unnecessarily imposing additional burdens on the VA with no benefit to the veteran are to be avoided). The VA has satisfied its obligation to notify and assist the veteran in this case. Further development and further expending to the VA's resources is not warranted. Taking these factors into consideration, there is no prejudice to the veteran in proceeding to consider the claim on the merits. *See Bernard v. Brown,* 4 Vet. App. 384, 394 (1993).

II. Laws and Regulations

Service connection may be granted for disability due to disease or injury incurred in or aggravated by service. *See* 38 U.S.C.A. §§ 1110, 1131. Service connection connotes many factors bur basically it means that the facts, shown by the evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service of through application

of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and the pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with the due consideration to the policy of the VA to administer the law under a broad and liberal interpretation consistent with the facts in each individual case. 38 C.F.R. § 3.303(a). With chronic disease shown in service (or within the presumptive period under Sec. 3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear-cut clinical entity, at some later date. For the showing of chronic disease in service there is a required combinations of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, ect.), there is no requirement of evidentiary showing of continuity. Continuity of symptomology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim. 38

C.F.R. § 3.303(B).

Service connection may be granted for any disease diagnosed after discharge, when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and VA regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid. 38 C.F.R. § 3.303(d).

III. Evidence and Analysis

The veteran testified in support of his claim for service connection for Lyme disease during a hearing held at the RO in March 1998. He stated that he was being treated for Lyme disease which had first appeared during service. He stated that he was the oldest living diagnosed case of Lyme in the world. However after considering all of the evidence of record, the Board finds that the preponderance of the evidence shows that the veteran does not currently have, nor has he ever had Lyme disease.

The veteran's service record medical records do not contain any references to Lyme disease. The Board noted that the records contain various complaints of symptoms which the veteran believes represented the undiagnosed symptoms of Lyme disease. For example the service medical record dated October 1952 shows that the veteran was observed for suspected rheumatic fever. In June 1953, he was for the purpose of ruling out hepatitis. From January to April 1954, he was hospitalized for complaints of pain and stiffness in the back and neck. A neuropsychiatric consultation report dated May 1954 notes that the veteran's doctors referred him for

evaluation of a possible hysterical conversion reaction. A subsequently record dated June 1954 shows that psychological testing had been completed and verified the clinical evaluation of a schizoid individual. An administrative discharge was recommended.

Although the veteran has expressed his own opinions that the symptoms noted in service represented Lyme disease, the Court has held that lay persons, such as the veteran, are not qualified to offer an opinion that requires medical knowledge, such as a diagnosis or an opinion as to the cause of a disability. *See Espiritu v. Derwinski,* 2 Vet. App. 492, 494-5(1992).

The Board notes that there are no medical records containing any mention of the possibility of the presence of Lyme disease until many years after the separation from service. In a written statement dated November 1997, Richard Karp, M.D. a specialist in infectious disease at a VA outpatient clinic stated that he had carefully read the medical record of the veteran beginning with service infirmary records dated from 1952 through discharge. He stated that the clinical diagnoses of the time and present knowledge indicated the onset of Lyme disease. He further stated that the veteran was presently diagnosed and treated for Lyme disease and exhibited the characteristics of late long term Lyme disease.

The Board notes, however, that Dr. Karp later changed his mind and concluded that the veteran did not have Lyme disease. In this regard, the Board notes that a VA treatment record dated in October 2001 and authored by Dr. Karp indicates that, although the impression included presumed seronegative Lyme disease, Dr. Karp noted that all diagnostic studies had been negative. He further noted that with new information regarding the veteran's psychiatric evaluation in

1954, one had to assume there was no evidence of Lyme disease with the multiple negative serologic tests and other studies.

In addition, opinions from other physicians weigh against the conclusion that the veteran has Lyme disease. A letter dated in May 1996 from Tufts University School of Medicine which is addressed to Richard Locksley, M. D., indicates that the veteran's antibody response to the Lyme disease spirochete B. bergdorferi was negative.

The report of an infection diseases examination conducted by the VA in December 1997 shows that the examiner noted that a question had been raised as to whether the veteran acquired Lyme disease during his active duty from June 1951 to October 1954. He noted that one year after entering service the veteran began to suffer from recurrent nonspecific illness. These episodes were characterized by pain and stiffness of wrists, neck, and back. They were usually not accompanied by any physical findings. He also noted the veteran's hospitalization for hepatitis and for psychiatric evaluation in service. He noted that beginning in 1995, the veteran began to reconstruct his past medical history in the context of possible Lyme disease and became convinced that he had the disease. He had a number of tests to evaluate the possibility of Lyme disease, and the tests were negative. The examiner noted that one of the tests was performed at a laboratory which was perhaps the most prominent study site for clinical Lyme disease. He had been treated for the past six to twelve months with oral antibiotics by Dr. Karp for a diagnosis of presumed Lyme disease. The veteran reported that upon the institution of erythromycin swelling behind his knee diminished substantially within days, The examiner noted that erythromycin was not an appropriate therapy for Lyme disease, and swelling behind the knee was not typical for that

diagnosis. Following the physical examination, the examiner made the following comments.

> My assessment of [the veteran] is that of a 65-year-old with a long history of vague and nonspecific complaints. The history of hepatitis in the 1950's is likely to have been real, although it is impossible to say based on current laboratory findings what the etiology of that hepatitis was. There was no evidence of chronic or persistent arthritis, and there was no evidence on gross exam of chronic or debilitating illness of any specific source. The etiology of this patient's pericarditis is unclear, but may well be due to a variety of commonplace chronic medical illnesses, including congestive cadiomyopathy. The history of purported meningitis is not corroborated by findings documented in the available medical chart.
>
> In particular, there is no good evidence to suggest that diagnosis of Lyme disease either in the 1950's nor at any time subsequently. [The veteran] was based in North Carolina during his years of active duty. There was no evidence that in the 1950's there was any significant degree of Lyme disease activity or of Borrelia burgdorferi infection within the tick population of North Carolina... There is little evidence that [the veteran] would have been exposed to Lyme disease in North Carolina in the 1950's.
>
> In addition, there is nothing about the patient's

> history or physical findings that suggests in a compelling fashion a diagnosis of Lyme disease. Each of his complaints can be explained on the basis of unrelated and common illness. I disagree with Dr. Karp's assessment that this patient exhibits the characteristics of late long-term Lyme disease. In fact, this patient's presentation is atypical for Lyme disease, and together with the repeated multiple laboratory tests suggest that Lyme disease is quite unlikely in this patient.

The report of an infectious disease examination conducted by the VA in December 2002 shows that the examiner reviewed the veteran's four large claims files. He noted that Dr, Karp had evaluated the veteran for years for possible diagnosis of Lyme disease, and had done many tests that including blood testing and physical examination on many occasions. The examiner contacted Dr. Karp by telephone and noted that he stated that he felt that the veteran had symptoms that were symptoms suggestive of Lyme disease, however he was never able to identify Lyme disease in the veteran with any degree of certainty. During the telephone discussion, Dr. Karp indicated that the patient does not likely have the diagnosis of Lyme disease. The VA examiner further stated that:

> To summarize this patients C-file, his electronic chart review through the VA Martinez, and conversations with the patient's treating infectious disease specialist indicate that this patient does not likely have Lyme disease.

Based on the foregoing medical evidence, the Board finds that the preponderance of evidence shows that the veteran does

not currently have Lyme disease. A service-connection claim must be accompanied by evidence which establishes that the claimant currently has the claimed disability. *See Brammer v. Derwinski,* 3 Vet. App. 223, 225 (1992); *Rabideau v. Derwinski,* 2 Vet. App. 141,144 (1992). Accordingly, the Board concludes that Lyme disease was not incurred in or aggravated by service.

ORDER

Entitlement to service connection for Lyme disease is denied.

S/ Jeff Martin

JEFF MARTIN
Veterans Law Judge, Board of Veterans' Appeals

Symbol WASHINGTON, DC
Office of the Assistant Secretary June 17, 2000
00-01065

MEMORANDUM FOR AFBCMR
FROM: BCMR Medical Consultant
1535 Command Drive, EE Wing, 3rd Floor
Andrews AFB MD 20762-7002
SUBJECT: Application for Correction of Military Records
WISTER, ROBERT B. 527-28-6267

This application for records correction is not filed timely as it has been 45½ years since the applicant was discharged from the Air Force. Considering the length of time since the discharge and the applicant's contention, it is nearly impossiable to draw any valid conclusions regarding his request. However, in the interest of justice, applicant's entire case file has been reviewed and is forwarded with the following findings, conclusions and recommendations.

REQUESTED ACTION: The applicant was given a General, Under Honorable Conditions, Discharge on October 16, 1954 after serving 3 years and 4 months on active duty. Discharge was because because if incompatibility for service secndary to a schizoid personality disorder. He applies now requesting a 100% medical discharge.

FACTS: The applicant contends that he contracted Lyme Disease during aviation cadet training in North Carolina and that this wasthe cause of all his subsequent hospitalizations and mental problems that led to his discharge. During his 3 years of service he was hospitalized on different occasions with a variety of problems that took him from duty for the better portion of an entire year. In the course of these admissions, thorough workups were performed for any number of possiable etiologies for his problems, being variously diagnosed with hepititis, mononucleosis, rheumatoid arthritis, flu-like symptoms, relapsing fever, rheumatoid

spondylitis. ect., all symptoms that relate to this disease. Records fail to firmly establish any of these conditions as valid diagnoses, and psychiatric consultations then led to extensive testing and observation with the resulting diagnosis of personality disorder emerging. The severity of this was such that administrative discharge was recommended and subsequently approved.

In the volumes of material submitted for appeal, the applicant but one statement, written in 1996 by a treating physician that substantiates the applicant is being treated for Lyme Disease, a disease that was unlabled in the 1950s, and only more recently recognized as a tick-borne disorder. It is not possiable to go back almost half a century and say with complete certainty that this was what caused the applicant's illnesses while serving on active duty although the Department of Veteran's Affairs (DVA) now considers considers the applicant to have a service-connected Lyme Disease disorder (February 9, 2000 decision).

DISCUSSION: As stated initialy, it is difficult to draw conclusions from information that is almost 50 years from the past, and the issue before us for consideration is this: did did the symptoms and findings exhibited by the applicant in his multiple hospitalizations in his service years relate to a disease that went unrecognized and unlabled, or was the personality disorder that led to his discharge and underlying constitutional problem? While the compilation of pages of minutiae tends to obscure the applicant's contention, buried in these volumes is information that may well relate to his problems as being secondary to an infection with the Lyme Disease organism, *Borrelia bergdorferi,* an organism similar to the kind which causes syphilis. The very diversity of symptoms and findings presented in the lenghty hospitalizations points with some degree to such an event as the underlying cause, and given the state of medical

knowledge of such illnesses in that day and time, such an illness would quite possiably have excaped detection. This is in spite of the testing that was done in the course of his evaluations. While this discussion cannot all the manefestatioos of this disease, a prominent one is development of mental aberrations such as exhibited by the applicant prior to his discharge. The intervening years have perhaps masked the actual time of onset of the disorder that has finally been recognized as Lyme Disease (1996), but the problems detailed in the extensive records indicate the likelyhood and plausability of onset occuring during the applicant's service years.

If we accept the premise that the applicant suffered from Lyme Diasease in the military, then we must decide what would have been an appropriate disposition upon his discharge. Clearly the first consideration is the character of discharge which we would recommend be changed to Honorable. Then given that the applicant suffered from an unfitting condition, what were the actual limitations? it appears that he was nowhere near the 100% disabled level that he seeks in his appeal, but, more realisticaly a 10% level would apply for the psychological manifestations that brought about his discharge based on current VASRD ratings for mild impairment under code 9327, Organic mental disorder, other (including personality change due to a general medical condition). Records indicate the applicant functioned as an "engieer" (medical record entry dated May 16, 1997) in his post-service years, thereby indicating the mildness of his disorder and his appropriate level under disability under which he should have been discharged.

RECOMMENDATION: The BCMR Medical Consultant is of the opinion that, in order to correct a long-standing injustice, the records should be changed to reflect that the applicant was medicaly discharged under VASRD Code 9327, disability

severance pay be made retroactively to his date of separation, and the discharge changed to Honorable.

s/ Frederick Hornick

FREDERICK W. HORNICK, Col., USAF MC, FS
Chief Medical Consultant AFBCMR
Medical Advisor SAF Personnel Council

Form 9 Filed with BVA 11/96
3/16/98 BVA docket issued #97 101 09A
Wister, Robert Bruce 18 558 714

I cite and annex to this statement the entire text of each of the following:

‡ 1. Text and bibliography (A) of letter of disagreement dated 11/19/96.

2. 38§3.301 Copy of AF form 452 (10/54) stating I **will** apply for disability compensation at a later date. 38§0.735-3 (signed under duress)

‡ 3. Denial of application for disability 1/55.

‡ 4. 38§3.400(2)(i)(ii) 104th congress act placing first date of VA disability claim at the first date of application.

5. Bibliographys of Lyme medical papers: General bibliography (B), General bibliography supplement (C), biblography of cysts in Lyme (D), bibliography of Lyme carditis (E), bibliography of Lyme test processes (F).

6. (CWLD) Coping with Lyme Disease, Denise Lang/w Derrick M. DeSilva, Jr. M.D. ISBN 0-8050-2650-9 Furnished

‡ 7. Medical records to present from VA Out Patient Clinic Oakland, VA Medical Center Martinez, VA Medical Center Ft. Miley all of California.

8. Partial record of medicines prescribed from 1973 to present.

9. Daily record of medical progress in treatment for Lyme with Erythromycin 1996-97. (1996 appointment list)

‡ 10. Compilation, with anotation, from military medical records 38§3.301 and subsequent treatment submitted with initial disability application with cover title "Wister's case for Lyme diagnosis 4/14/96'.(Submitted with local office action 343/211/mjg)

‡ 11. Records titled "Robert B. Wister 6267, cardiac

records 53-54, Lyme carditis bibliography" submitted during cardiac evaluation 4/9/97 VA Ft Miley. (part of Ft. Miley records)

12. Lincoln National medical insurance offer 5/90.

‡ Early 1996 a request was made for COMPLETE MILITARY MEDICAL RECORDS 38§3.2(e) Robert B. Wister Serial AF19398867. 38§1.513(b)(i)(ix) Partial records were submitted. 38§0.735-3 The following were excluded and are critical to reverse several false contentions [9/12/96] of the VA 38§3.304(b) of "congential disease".

1. 12 June 1951 entrance medical
2. Brooks AFB record of hernia operation 51
3. Brooks AFB aviation cadet physical 51
4. Maxwell AFB hospital clinical records 52-535. Keesler AFB hospital clinical records 53
6. Greenvile AFB General Courts hearing for resignation from cadets.
7. Letterman Army Hospital clinical records 54.
8. Mather AFB discharge medical 54

38§3.303 (b) Onset, of Lyme, is borne out beginning with the "July 18, 1952 entry of admission to hospital for sore throat, chest pain and 101^{0}F temperature." Subsequent clinical comment such as; common cold, influenza, Barotitis (sic) media, joint pain and stiffness, wrist neck and back, rheumatic fever, in sum designate the onset of Lyme disease (CWLD). None of any symptomatic etiology separately was borne out as an ongoing disease. The mimic character of Lyme as a phlanax of symptoms at onset (stage 1) was borne out. The only laboratory evidence cited is elevated sedrate at each stage of hospitalization. Then current ignorance of the disease prevented approprate laboratory tests.

38§3.303 (a)Subsequent admissions to hospitals at Maxwell AFB, Greenville AFB, Keesler AFB, Mather AFB, Letterman Army Hospital elicited clinical investigation of;

rheumatoid spondylitis, infectious hepatitus, syncope, hearing loss, tumor of jaw, cyst of left neck, psycharitic hysteroid, schizoid makeup (stage 3).

38§3.154 During hospitalization cited above drugs such as penicillin and ACTH were administered. Penicicillin intermuscular in small doses for short periods causes temporary remission of Lyme disease as seen in the clinical record. It excaberates long term outcome by causing resistance to further penicillin treatment. Only sustained long term penicillin (Amoxicillin) treatment (30+ days) of early (stage 1) disease is found effective. ACTH is found to excaberate the disease at all stages. It was administered at Mather AFB and Letterman Army Hospital and Letterman Army Hospital, thereby causing negative prognosis for cure of stage 3 disease. Current 1997 prognosis for stage 3 Lyme is poor. There is believed to be no assured CURE for Lyme after reaching this stage. Recent heart disease of pericarditis (2/13-3/7 97) is identified as one known symptomatic evidence of stage 3 Lyme.

First specific tests for Lyme were made in spring 1996. This is 44 years after onset which the literature states has little chance of identification of the spirochette since sequestering, resistance response, mutation deny verification by laboratory processes. Spinal tap taken in 1952 placed under election microscope would have idenitfied the spirochette at that time. Requests for electron microscope investigation of cysts and recent heart tap liquid from pericarditis have been specificaly refused. Recombinant DNA tests by QUALIFIED LABORATORIES to standards cited in the literature have not been done. All tests have been made at the level used to identify, stage 1, early onset Lyme and are inappropriate for a 44 year old, stage 3, case.

38§3.303(a)(b)The following are symptoms (* 50 my case) identified in (CWLD) Lyme cases;
SKIN

Etyherma migrans-bull's eye rash

* Lymphocytoma-rash resembling a skin cancer
* Malar rash-resembles lupus on cheeks and nose
* Urticaria-hives similar to allergic reaction

Cellulitis-rash caused by bacterial infection

HEART

Heart block-slowed heart rhythm due to electrical signal failure

* Myocarditis-inflamation of the heart muscle
* Pericarditis-inflamation of the membrane surrounding the heart
* Arrhythmia-irregular heart beats
* Cardiomegaly-enlarged heart
* Syncope-fainting
* Dizzyness
* Shortness of breath
* Chest pain-resembles heart attack
* Palpitations-rapid heart beat or skips

Gallops-triple cadence in heart sound, caused by abnormal or fourth beat

NEUROLOGIC

Bell's palsy-paralysis of a facial nerve

* Radiculopathy-disease of spinal nerve roots

Meningitis-inflamation of the membrane surrounding the brain

Encephalitis-inflamation of the brain

* Peripherial neuropathy-disease of the peripheral nerves

Plexopathy-disease of the nerve networks

Chorea-spasmodic movements of the limbs or facial muscles

Multineuritis multiplex-inflamation of multiple nerves

* Transverse myelitis-inflamation of the spinal cord

Cerebellar ataxia-loss of muscle coordination caused by disease in the cerebellum

of the brain

Pseudotumor cerebri-abnormal increased pressure on the brain

Guillian-Barré-like illness

Multiple sclerosis-like illness

Seizures

Cranial arteritis-inflammation of the arteries in the brain

Headache-mild to excruciating

* Stiff neck

* Dysesthesias-impairment of normal sensation

* Paresthesias-abnormal sensations, such as burning, pricking or tingling

* Sleep disturbance

* Hearing loss

Hemiparesis-partial paralysis of one side

* Paraparesis-partial paralysis of lower extremities

EYES

* Double or blurry vision

* Floating spots

Oversensitivy to light

* [Retinal detachment]

Flashing lights

EARS

* Decreased hearing in one or both ears

Buzzing in ears

* Pain in ears

* Ringing in one or both ears

RESPIRATORY

* Shortness of breath, cough

* Chest pain or rib soreness

* Night sweats or unexplained chills

PSYCOLOGICAL

* Mood swings, irritability

* Unusual depression

* Disorientation (getting or feeling lost)

Feeling as if your are loosing your mind (soon)
Overemotional reactions, crying easily
* Too much sleep or insomnia
* Difficulty falling or staying asleep

MENTAL

* Memory loss (short or long term)
* Confusion or difficulty in thinking
* Difficulty with concentration or reading
* Going to the wrong place
* Forgetting how to perform simple tasks

GENERAL

* Unexplained weight gain or loss
* Extreme fatigue
* Swollen glands
* Unexplained feevers, high or low grade
* Symptoms seem to change, come and go
* Pain migrates to different body parts
** Early on, experienced a "flu like illness" after which you have not felt well since

Note the similarity to Gulf Syndroms 38§3.317(5)(b)(1-12)

‡ 38§3.328 38§20.901 It is further stated that NO determination of Lyme presence or absence and onset may be made without independent review of the medical records in their entirety by a QUALIFIED PRACTICING LYME SPECALIST. Such qualification must consist of minimum of 100 patients in third stage Lyme by the doctor or an aggregate of several doctors in such practice. Such qualification is required by the very nature of variability of Lyme infection. Drs named as authors of listed bibliography papers will be primarily considered.

I claim:

1. 38§3.340(3) 38§3.4(b) 38§3.400(2)(i)(ii) Compensation for 100% disability from first date of application January 1955 to present and continuing.

2. 38§3.340(i)(ii) Compensation for loss of education

due to ongoing episodes of Lyme symptoms.

3. 38§3.31(c)(3)(i) Compensation for continuing medical expenses as a civilian without VA medical assistance 1955-95.

4. 38§3.340(b) Compensation for loss of income during and ensuing from medical epsodes with exclusion from medical insurance coverage and resulting exclusion from employment and retirement plans.

5. 38§0.735-3 38§3.340(3)(b) Compensation for ongoing and continuing refusal of the Veterans Administration to evaluate and adjudicate the disability application with evaluation of ongoing medical episodes indicating chronic disease, 1955-present.

6. 38§20.611 38§0.735-3 Extension of the right to apply punitive compensation for continuing dilatory action by the VA, refusing to act in relevant manner.

‡ The following sections of USC title 38 are noted, and invoked, as relevant to the conduct of the appeal hearing: 38§19.12(a), 38§20.710-711 [Dr. Richard Karp OVAMC, Captain Thomas A. Hensel, USAF MC, et. al.], 38§20.715, 38§20.901(d).

* * * *

Notes: ‡ indicates papers previously presented and in the hand of the VA or solely available to the VA.
Bibliographys are cited in each articles full text and reference will be made in present and future actions to such full text.
Recording **will be made** of all proceedings for use in future actions as provided in USC title 38§20.715.
Specificaly, applicant has provided in his will for proceedings to continue per USC title 38§20.611.
Computation of money compensation for claims 1-5 shall be the sole right of claimant 38§3.4(b).

previous SC filings
RE: SC 97-3220-2055/1746 March 22, 2004

Leading case: lyme cases list attachemnt to Other January 23, 2007

Court of Veterans Appeals

Legal decisions pertaining to my case for Lyme

Westreports decisions of the CVA. Robert B. Wister case 18 558 714

Winn v. Brown 8 Vet. App. 510, 38§1111, 96 Induction physical creates presumption of soundness.

Marlow v Brown 5 Vet. App. 146, DIS F.3d 443, 93 BVA finding of no "clear and unmistakable error" in prior decision, 1948, evidence confirmed case, action was arbitrary and capricious'.

Wade v. Derwinski 3 Vet. App. 76, 92 Lay evidence including veterans observations may be sufficent to warrant service connection.

Gregory v. Brown 8 Vet. App. 563, 38§5107 (a); Caluza v. Brown 7 Vet. App. 489 aff 78 F. 3d 604 RH Den/Holland v. Brown 6 Vet. App. 443, 96 Submission of well grounded claim is prerequsite to triggering duty to-assist obligation.

Falzone v Brown 8 Vet. App. 398, 95 Reopen claim on new and material evidence.

Fanning v. Brown 4 Vet. App. 225, 38USCA§1155, 92 VA has authority to adapt ratings to compensate for reduced employability due to injury.

Betters v. Brown 6 Vet. App. 333, VRR 38USAC§3.03 (b), 93 If evidence is established disease manifested in service was chronic, there is no requirement for continuity of symptoms.

Talbert v. Brown 7 Vet. App. 352, 38§§5108, 7104 (b), 95 "Clear and unmistakable error" first and subsequent decisions on "cured" disease or remission.

Cook v. Brown 4 Vet. App. 231, 93 Unreasonableness of

time lapse between manefestation of chronic disease and definite diagnosis is strength of evidence establishing evidence of disease manefestations and chronic disease.
Lendenmann v. Principi 3 Vet. App. 345, 92 Where no code exists, VA must evaluate under codes for analogous disorders.
Moore v. Derwinski 1 Vet. App. 401, 38 USCA §§354 (b), 5107,; PB VRR §§3.102, 3.304 (d), 38 USCA § App-, 91 Destroyed records create presumption of service connection.
Dixon v Derwinski 3 vet 261, 263. '92 which held that VA breached the duty to assist where it failed to inform the claimant of the need to submit "alternative forms of evidence" where SMRs were lost,
Murphy v. Derwinski, 1 Vet.App. at 82 (duty to assist extends to the securing of any relevant military, VA, or other government records or, with appellant's cooperation, private medical, hospital, employment, or other civilian records).
see also O'Hare v. Derwinski, 1 Vet.App. 365, 367 (1991) (when SMRs have been destroyed, BVA has heightened obligation to provide explanation of reasons or bases for its findings and to consider benefit-of-doubt rule).
Curry v Brown 91-504 When an appellant's service records are missing, as the record shows that most of the veteran's are, "the BVA's obligation to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule is heightened." *Moore (Howard) v. Derwinski*, 1 Vet.App. 401, 406 (1991); *see also O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991).
Mattson v. Derwinski 2 Vet. App. 643, 38USCA§5107 (a), 92 Abscence of medical records places burden on BVA (141 Heightened).
Hicks v. Principi 4 Vet. App. 2, 94 Substantial gainful employment must address patchwork employment history.
Peters v. Brown 7 Vet. App. 342, (102) 38USCA§5121 (a,c) Accrued benefits survive death of veteran.
Whipp v Principi 3 Vet. App. 453, 94 Care in emergency,

VA not available or refused.
Grottviet v Brown 5 Vet. App. 91, 93.:Espiritu v Derwinski 2 Vet. App. 492, 494-5 (1992) Lay testimony may be sufficent
Epps, 126 F.3d at 1469 (emphasis added) duty to assist in "well grounded case"
(1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of occurrence or aggravation of a disease or injury in service; and (3) medical evidence of a nexus between an in-service injury or disease and the current disability. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Epps v. Brown*, 9 Vet.App. 341, 343-44 (1996), *aff'd* 126 F.3d 1464, 1468 (Fed. Cir. 1997)
^^^^

38 C.F.R. § 3.303(b) (1998), by the submission of (a) evidence that a condition was "noted" during service or during an applicable presumption period; (b) evidence showing postservice continuity of symptomatology; and (c) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the postservice symptomatology. *Savage v. Gober*, 10 Vet.App. 488, 495-97 (1997).
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The determination of whether a claim is well grounded is a matter of law which this Court reviews de novo. *Grivois v. Brown*, 6 Vet.App. 136, 139 (1994).
^^^^^^^

"clear and unmistakable error." *See Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc); *see also Chisem v. Brown*, 4 Vet.App. 169, 176 (1993).
^^^^^^^

Bailey v. Derwinski, 1 Vet.App. 441, 446-48 (1991) (reversing as product of arbitrary and capricious decision making process Board decision)

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"clearly erroneous" standard pursuant to 38 U.S.C. § 7261(a)(4), *see Elkins*, 12 Vet.App. at 217

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"plausible" basis for such BVA determinations, the Court cannot overturn them. *Gilbert v. Derwinski*,

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> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment . . . , and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151 (1991); *see Brown v. Gardner*, 513 U.S. 115 (1994).

^^^^^^

(distinguishing *Tirpak* and stating in dictum that medical evidence as to nexus to service expressed as "could" suffices for requirement of well-grounded claim), *with Alemany v. Brown*, __ Vet.App. __, __, No. 94-1025, slip op. at 3 (Nov. 20, 1996)

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his statements as to continuity of symptomatology "provide a direct link between the appellant's active service and the current state of his condition"); *Godfrey v. Brown*, 7 Vet.App. 398, 406 (1995) (where service-connection claim is based on continuity of symptomatology under 38 C.F.R. § 3.303(b) (1994), competent medical evidence not necessarily required to make claim well grounded).

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Wood, 1 Vet.App. at 193, which involved the obligations

imposed on the Secretary and a claimant under the duty to *assist* pursuant to 38 U.S.C. § 5107(a), that "[t]he duty to assist is not always a one-way street. If a veteran wishes help, he cannot passively wait for it in circumstances where he may or should have information that is essential in obtaining the putative evidence."

Wallin and *Sacks, supra*; *see also Libertine v. Brown*, 9 Vet.App. 521, 523 (1996) (medical treatise evidence must demonstrate connection between service incurrence and present injury or condition)

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employability Colvin v. Derwinski, 1 Vet.App. 171, 175 (1991).

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it is not the function of this Court to determine in the first instance which version of the law is most favorable to the claimant. *Baker v.West*, 11Vet.App. 163 (1998). Accordingly, a remand is required in order to provide the Board with an opportunity to readjudicate the veteran's claim. *See generally Karnas v.Derwinski*, 1 Vet.App. 308, 312-13 (1991) (when law or regulation changes after claim has been submitted, but before administrative or judicial appeal process has been concluded, law which is most favorable to plaintiff must be applied).

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Hilkert v. West, 12 Vet.App. 145, 149-50 (1999) 96-208 "stealth consideration" Not only is this notion contrary to basic principles of rational decisionmaking, but such unwritten, undisclosed consideration clearly violates the later enactments of Congress requiring that the Board (in 1988) and then regional offices (effective in 1990) must include in their decisions the ***reasons*** for them and not hide their reasons and reasoning under the table.

^^^^

"Service connection may be granted for any disease diagnosed

after discharge, when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service." 38 C.F.R. § 3.303(d) (1998). "Disability which is proximately due to or the result of a service-connected disease or injury shall be service connected." 38 C.F.R. § 3.310(a) (1998).

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On remand, the Board must ensure compliance with the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096. *See Fortuck v. Principi*, 17 Vet.App. 173, 181 (2003); *Charles v. Principi*, 16 Vet.App. 370, 374 (2002); *see also* 38 U.S.C. §§ 5103(a), 5103A; *Quartuccio v. Principi* 16 Vet.App. 183, 187 (2002). In addition, the Board must ensure compliance with this Court's decision in *Stone v. Gober*, 14 Vet.App. 116, 119-20 (2000) (requiring Under Secretary for Benefits to provide adequate rationale for conclusion, pursuant to 38 C.F.R. § 3.311(c)(ii) (1999), that there was no reasonable possibility

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The delay involved, although frustrating to the petitioner, must be unreasonable before this Court will inject itself into VA's adjudicative process. *See Bullock v. Brown*, 7 Vet.App. 69, 69 (1994)

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Service connection may be established by demonstrating chronicity under 38 C.F.R. § 3.303(b), which provides:

> subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or

> pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity . . . as distinguished from merely isolated findings or a diagnosis including the word "Chronic."

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consistent with general rules of agency in that principals are liable for the misdeeds committed by their agents when the agents act with apparent authority. GLEASON v. SEABOARD AIR LINE R. CO., 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed 415 (1929)

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ERSPAMER v Derwinski 89-14 The All Writs Act provides that

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

The United States Court of Veterans Appeals is a "court[] established by Act of Congress." Section 4051 of the Veterans Judicial Review Act of 1988 (VJRA), Pub. L. 100-687, Title III, Sec.301, 102 Stat. 4113, provides that "[t]here is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals." Article I courts are empowered to exercise jurisdiction under the All Writs Act. See, e.g., Noyd v. Bond, 395 U.S. 683, 695 n.7, 89 S.Ct. 1876, 1883, 23 L.Ed.2d 631 (1969) (United States Court of Military Appeals); United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966) (United States Court of Military Appeals) We hold further that the decade of delay by the

Veterans Administration, and its successor, the Department of Veterans Affairs, in acting upon the claims submitted by petitioner and her husband has been unreasonable and that petitioner has exhausted all available alternative remedies.

"all evidence and material of record," 38 U.S.C. § 7104(a), and must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record," 38 U.S.C. § 7104(d)(1). *See Douglas v. Derwinski*, 2 Vet.App. 435, 438-39 (1992) (en banc); *Gilbert*, 1 Vet.App. at 56-57.

The "Clearly Erroneous" Standard of Review

Congress has provided that this

> Court . . . to the extent necessary to its decision and when presented, shall . . . in the case of a finding of material fact made in reaching a decision in a case before the [Department of Veterans Affairs] with respect to benefits under laws administered by the [Department of Veterans Affairs], hold unlawful and set aside such finding if the finding is clearly erroneous.

38 U.S.C. § 4061(a)(4) (1988).

"clear and convincing evidence", which applies

> when the individual interests at stake . . . are both "particularly important" and "more substantial than mere loss of

> money." . . . the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."

Santosky, 455 U.S. at 756.
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not yet been addressed by the Board of Veterans' Appeals (BVA), *see Elkins v. Gober*, 229 F.3d 1369, 1377 (Fed. Cir. 2000)
^^^^^^^^^^

(1) inexcusable delay on the part of the claimant, and (2) prejudice resulting therefrom to the detriment of defendant. *Pepper v. United States*, 794 F.2d 1571, 1573 (Fed. Cir. 1986). "Failure to act promptly will operate as a bar to recovery *where the delay results in injury* [or] *prejudice* to the adverse party." *Deering v.*

United States, 620 F.2d 242, 244 (Ct. Cl. 1980) (en banc) (emphasis added) (quoting *Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974)). The applicability of laches is a matter left to the discretion of the Court. *See Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 534 (1956); *see also Jamesbury Corp. v. Litton Indus. Prods., Inc.*, 839 F.2d 1544, 1551 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 828 (1988).
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"[i]t is the obligation of VA . . . to render a decision which grants [the veteran] every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a).

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Manio v Derwinski 90-86 Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.

> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. *In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.*

H.R. Rep. No. 963, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5782, 5795 (emphasis added).

"new and material", that determination (but only that determination) would be subject to review on appeal to this Court. If we find this determination "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law" under 38 U.S.C. § 4061(a)(3)(A) (1988), a remand would be required.
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JEAN A. ERSPAMER v Derwinski 89-14 February 23, 1990) "expeditiously as possible" ten years or more for INDEPENDENT MEDICAL REVIEW. However, All Writs Act jurisdiction extends beyond pending cases; it embraces the prospective and potential jurisdiction of a court as well. As the Supreme Court has held: "The exercise of this [All Writs Act] power . . . extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected."
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"full benefits of these procedural safeguards". *Bernard*, 4 Vet.App. 384, 393-93 (citing, e.g., 38 U.S.C. §§5104, 7105(d)(1); 38 C.F.R. §§ 3.103(a), 19.29, 19.131).
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Gilbert, supra; *Jones (McArthur) v. Derwinski*, 1 Vet.App. 210, 219 (1991) (separate views regarding "[a]voiding a fruitless remand for superfluous factfinding").
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Floyd D. *Bucklinger v Brown* 92-273 disease vs trauma causitive of disability [**constitutional question**] 38 C.F.R. § 4.87a, DC 6260 (1992)
^^^^^^

Robinette v. Brown, 8 Vet.App. 69 (1995). *Robinette* held that when a veteran has failed to submit with his original application sufficient evidence to well ground his claim and the Secretary is "on notice of relevant evidence that may have existed, or could have been obtained, that, if true, would have made the claim 'plausible,'" then the application is incomplete and the Secretary has an obligation under 38 U.S.C. § 5103(a) to advise the veteran of the evidence needed to complete the application.
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In *Thurber v. Brown*, the Court held:

> [B]efore the BVA relies, in rendering a decision on a claim, on any evidence developed or obtained by it subsequent to the issuance of the most recent [Statement of the Case (SOC)] or [Supplemental (SOC)] with respect to such claim, the BVA must provide a claimant with reasonable notice of such evidence and of the reliance proposed to be placed on it and a reasonable opportunity for the claimant to respond to it. *Thurber*, 5 Vet.App. 119, 126 (1993)

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Clyde E. Graves, Brown 94-915 Sec denied access to evidence (July 31, 1995 PER CURIAM.)

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Thuan L. Hasty, v Principi 98-1511 VCAA intervention in case time, On remand, the appellant is free to submit additional evidence and argument necessary to the resolution of her claim. *See Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). The Board shall proceed expeditiously. *See* Veterans' Benefits Improvement Act, Pub. L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994) (found at 38 U.S.C. § 5101 note)

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Oscar G. *Fugere, v Derwinski* 89-72 An action of the [Secretary] to which **section 552(a)(1) or 553 of title 5** (or both) refers . . . is subject to judicial review. . . . [I]f such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title [Veterans' Judicial Review Act], the provisions of that chapter shall apply.

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Fugure v Derwinski 89-72 undesirable specter of piecemeal litigation. *Cf. Flanagan v. United States*, 465 U.S. 259, 263-64 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449

U.S. 368, 373-74 (1981)
^^^^^^

Oscar G. Fugere v Derwinski 89-72 Notification of change of regulations.
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Walters v Derwinski 91-1370 Board refused to follow precedent established by this Court in *Fugere v. Derwinski*, U.S. Vet. App. No. 89-72 (Dec. 27, 1990) Summary reversal.
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William M. *Colvin v Brown* 91-1342 [med opinion] Court expects that the BVA will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case."); *cf. Manio v. Derwinski*, 1 Vet.App. 140, 145-47 (1991). On consideration of the foregoing, it is

ORDERED that the decision of the Board is VACATED and the matter REMANDED for further adjudication consistent with this order. Weber [[when viewed in the context of all the evidence, both new and old, would change the outcome") [hereinafter *Colvin* test]] Remand for new evidence. *see Elkins*, 12 Vet.App. 209, 218 (1999)
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the appellant will be free to submit additional evidence and argument" on the remanded claims. *Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992)
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VA must demonstrate the reasonableness, in law and fact, of the position of the VA in a matter before the Court, and of the action or failure to act by the VA in a matter before the VA, based upon the totality of the circumstances, including merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court.

Stillwell, 6 Vet.App. at 302-03.
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Thurber IMO; BVA panels may consider only independent medical evidence to support their findings. If the medical evidence of record is insufficient, or, in the opinion of the BVA, of doubtful weight or credibility, the BVA is always free to supplement the record by . . . *citing recognized medical treatises in its decisions* that clearly support its ultimate conclusions. *See* [38 U.S.C.A. § 7109 (West 1991)]; *Murphy v. Derwinski*, 1 Vet.App. 78, 81 (1990). (Emphasis added.) Subsequent to the Court's decision in *Colvin* and the issuance of the BVA's decision here on appeal, as indicated in part I., *supra*, the Court held that, prospectively, if the BVA relies on a portion of a medical treatise in arriving at its decision, the BVA must quote the relevant portions upon which it relies, and that "such quotations should be of sufficient length so that their context (both within the treatise in question and within the body of relevant literature) is able to be determined." *Hatlestad*, 3 Vet.App. at 217.
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Thurber v Brown 92-172 Extension to appellant; The procedure that the Court called for in *Colvin* . . . was designed to ensure "that *all medical evidence contrary* to the veteran's claim will be made known to [the veteran] and be a *part of the record* before this Court." . . . . . [Q]uotations from medical treatises . . . should be of sufficient length so that their context (*both* within the *treatise in question and* within the body of *relevant medical literature*) is able to be determined.
^^^^^^

The ability to overcome the handicap of disability varies widely among individuals. The rating, however, is based primarily upon the average impairment in earning capacity, that is, upon the economic or industrial handicap which must

be overcome and not from individual success in overcoming it. However, full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability and to the effect of combinations of disability. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. . . .
38 C.F.R. § 4.15 (1993)
^^^^^^^

Holland v Brown 92-728; 38 C.F.R. § 4.16(a) (emphasis added). A veteran with service-connected disabilities that do not meet the percentage requirements detailed in subsection (a), however, may still seek extra-schedular consideration of a TDIU rating. 38 C.F.R. § 4.16(b) (1993) *See Holland v. Brown*, 9 Vet.App. 324 (1996)
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"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702

*Kiser v Principi 98-390; "expeditious treatment" for claims remanded by Board or Court). *See Drosky v. Brown*, 10 Vet.App. 251, 257 (1997); *Allday v. Brown*, 7 Vet.App. 517, 533-34 (1995). On remand, the appellant may submit additional evidence, to the extent appropriate to a CUE matter, and argument on the remanded claim. *See Kutscherousky v. West*, 12 Vet.App. 369 (1999) (per curiam order). The Court notes that a remand by this Court or by the Board confers on an appellant the right to VA compliance with the remand order and imposes on the Secretary a

concomitant duty to ensure compliance with the terms of such an order. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998).
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§ 7261. Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veteran Claims, to the extent necessary to its decision and when presented, shall – . . . .

(4) in the case of a finding of material fact *adverse to the claimant* made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside *or reverse* such finding if the finding is clearly erroneous. (b) In making the determinations under subsection (a) of this section, the Court shall *review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall* –

END OF APPENDIX